IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2012-KA-01158-SCT

HARVILL PAYNE RICHARDSON — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

BRIEF OF APPELLANT
(Oral Argument is Requested)

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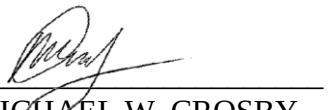
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Harvill Payne Richardson, Appellant/Defendant below
2. Edith Richardson, wife of Appellant/Defendant
3. State of Mississippi, Appellee
4. Judge John C. Garguilo, trial court judge
5. Michael W. Crosby, attorney for Appellant
6. Thomas E. Payne, attorney for Defendant
7. Mark Ward, Assistant District Attorney
8. Beth McFadyen, Assistant District Attorney
9. Rudy Quilon, victim/deceased



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Attorney of Record for
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STATEMENT OF THE CASE

A. Mr. Richardson was indicted on March 15, 2010, by the Grand Jury of Harrison County for MURDER, pursuant to Mississippi Code Annotated §97-3-19 (1)(a); A jury found Mr. Richardson /Appellant/Defendant below, guilty of MURDER. (CP 105-106; RE 6-7) The trial court imposed a sentence of life imprisonment on May 26, 2011. (CP 105-106; RE 6-7) Further, the trial court overruled the Appellant's Motion for Judgment Notwithstanding the Verdict or Alternatively; Motion for a New Trial and finding that the Verdict was against the Overwhelming Weight of the Evidence on July 6, 2012. (CP 130; RE 11). The Notice of Appeal was filed on July 13, 2012. (CP 132; RE 12), followed by the Designation of Record July 13, (CP 133; RE 13).

B. Preamble:

This writer is an attorney with 27 years of experience in numerous jury trials, all over the South including Mississippi, Alabama and Texas in both federal and State courtrooms. Never, have I been more disappointed in the judicial proceedings more so than in the case now before this Honorable Court. As this writer describes the egregious errors of the Trial Judge and Prosecutor, nothing contained herein should be considered contemptuous in either voice or adjective; instead, your Honors may rightfully perceive sadness - profound sadness, not because a veteran of so many hard fought courtroom battles was disrespected, but because said veteran of so many hard fought courtroom battles was completely unable to protect/defend his client, himself a veteran of 27 years (Air Force retired) of hard fought and highly decorated years as a serviceman. Never having been issued so much as a traffic citation, possession a zero prior record, Mr. Richardson is currently residing in prison, steadily fading away as he serves his sentence of "life."

The first issue raised, (i.e. denial of State of Mind facts) is more than sufficient for this Court to reverse and remand for a fair trial; however, the numerous errors that happened in this case should not have happened, and should never happen again. Mr. Richardson has given a huge portion of his life, already, when he volunteered for the service at the behest of U.S. President Kennedy's call to action, and now that he has been serving the unjust sentence from an unfair trial, to give this sacrifice some meaning, we implore this Highest and most respected Court, to address the remaining cumulative errors reflecting Prosecutorial Misconduct and Judicial Bias, and provide unequivocal guidance to prevent such tragedies from ever occurring in the sacred boundaries of our beloved State of Mississippi.

C. <u>Parties and Witnesses:</u>

(Please use the following list of names and brief descriptions of their significance in these proceedings as a reference guide which with help identify the last names and nicknames of the parties involved):

1) **Harvill Payne Richardson**, hereafter "**<u>Mr. Richardson</u>**"
   - Defendant, Appellant;
   - Shot Quilon with .44 caliber pistol, after firing one warning shot into ground, which deceased ignored
   - GSR (i.e. gunpowder residue) – his hands had **<u>NO gunpowder</u>**
2) **<u>Edith Richardson</u>**, hereafter, "**<u>Mrs. Richardson</u>**"
   - Gave statement to biased Investigator, which conflicted with numerous other statements she gave to various, non-biased police officers before and at trial.
   - Had **<u>GSR on both hands and back of one hand</u>**
3) **<u>Rudy Quilon, "victim"</u>** deceased, hereafter, "**Quilon**"
   - his hands had **<u>NO gunpowder</u>**
4) **<u>Investigator Michael Brown</u>**
   - Assigned the "lead" as lead case investigator on night of shooting, but at trial, flip-flopped on whether he was still the "lead" investigator, or lowered to a mere investigator
   - Interviewed Defendant, his wife, and all witnesses
   - Gave conflicting trial testimony as to whether he was "lead" investigator – flip flopped

- Administered GSR test,
- Brought case file to court
- Claims that he did not remain the "lead" Investigator (a claim that the Prosecutor relied upon to try to prevent GSR results and cell phone photos of Mrs. Richardson from being admitted into evidence), and further, no explanation for deceased's missing clothing was ever given, which could have proved close proximity when the gun was fired, but claiming that he was not the "lead" investigator was an excuse for having no knowledge about missing clothing

5) **Investigator Richard Britt**
   - Veteran Crime Scene Investigator
   - Collected evidence, took pictures at autopsy depicting stippling (showing close proximity) on bullet hole wound with rod depicting trajectory

6) Dr. Paul McGarry, pathologist
   - Testified that based upon amount of stippling, the barrel of gun, when fired, was within 3 feet. Assuming victim was wearing clothing at time of shooting, the distance would have been closer (note, the clothing was never examined by doctor nor anyone else and was not produced at trial, thereby preventing proof of very close proximity (T 391-394; RE 227-230)

7) **Inv. Bobby Darden** – not available for trial
   - Supposedly became the "Lead" detective after Inv. Brown had already investigated most everything, except for receiving the GSR results that had already been collected and sent of off by Inv. Brown, and he subpoenaed the photos from cell phone of victim, that Brown collected
   - No explanation as to why he supposedly became "lead" detective and why he was not available for trial – thus no explanation for missing clothes of deceased

D. Allowing Quilon to move into the Richardson home, ending with a tragic Shooting:

Mr. Richardson met Quilon at a church retreat, and the church elders asked Mr. Richardson to help Quilon because he was homeless. Quilon had been in prison, and his children kicked him out of their house, and he had nowhere to live. Mr. Richardson agreed to allow Quilon to stay at his home, for a few weeks until he could get established and survive on his own. (T 96-113; RE 63-80)

Mr. Richardson is retired from the United States Air Force[1] (approximately 27 years), having been honorably discharged and received numerous awards and decorations. He had absolutely no criminal record in either the military or private life. He lived in Woolmarket[2] with his wife of over 22 years and their children. They did not know that Quilon was on parole, although they were aware he had been in prison. They were under the impression that he regretted his past and wanted to live a Christian life – all he needed was a little help to turn his life around. Thus, as summarized by Defense counsel, at the time Mr. Richardson agreed to allow Quilon into his home, he did not know that he was still dangerous, and they did not know exactly why he was in prison (T 42; RE 43). (T 32-44, 65, 80, 82-96, 96-113; RE 33-43, 47, 48, 49-63, 63-80).

Although the stay was supposed to be brief and until he could find somewhere else to live, he resisted all efforts encouraging him to vacate the Richardson's home. Before long, Quilon entrenched himself in the home, and began to behave outrageously. The "few weeks" turned into a month, which turned into a total of five months until the shooting. First, Quilon developed an unhealthy attraction towards Mr. Richardson's wife and took improper photos of her with his phone camera. Then he advised that he could not leave due to a lack of transportation and inability to afford other housing. This resulted in Mr. Richardson purchasing him a car and paying for many months' rent elsewhere expecting Quilon to leave. He did not. Then Quilon began to brag about his prison convictions (Murder and Armed Robbery) and spoke proudly about horrific things he did in prison such as killing a "snitch" and acting as a "hit-man." At first, he implied that he was a bad man capable of harming anyone who upset him, and then he began to make direct threats to Mr. Richardson. Quilon claimed that should he ever pull a

[1] His service was in Asia during the Vietnam War, where he experienced enemy fire and saw many of his fellow servicemen killed. This is when he developed PTSD, discussed in more detail hereafter.
[2] Close proximity to Biloxi and Gulfport, Mississippi, Harrison County, Second Judicial District.

weapon on him, that he would take it from Mr. Richardson and use it against him. The bragging and the threats became increasingly worse over the five-month stay, culminating the night of the shooting incident. (T 32-44, 65, 80, 82-96, 96-113; RE 33-43, 47, 48, 49-63, 63-80)

Mr. Richardson took the bragging and threats to be an intimidation ploy on Quilon's part to prevent him from demanding that Quilon exit the residence. Should Mr. Richardson insist that Quilon leave before he was ready, Quilon created the impression that he was a dangerous man to be feared and that he should not be crossed or the lives of the Richardson family would be in danger. In the trial, Mr. Richardson provided a proffer of his proposed testimony regarding his state of mind caused by Quilon, as follows:

1. Quilon disclosed that he was actually still on parole, and bragged about his convictions of murder (1976) and armed robbery (1985);
2. that while he was in prison, he strangled to death a snitch and acted as a hit man;
3. he was still in a gang and he had friends who were killers, and who would kill anyone who happened to cross him;
4. he bragged about his prior record and described the ways he murdered and hurt his victims, including a young Latina gang-member snitch he killed in San Diego and disposed of her body; he bragged that he choked to death a cell mate who was much bigger, knocking him down and choking the life out of him;
5. he would say these things to Mr. Richardson for intimidation purposes so that he could remain in the Richardson home;
6. Quilon obtained a computer and watched pornography, and showed it to Mr. Richardson's daughter and nephew (causing them to move out). When he refused to stop viewing it, Mr. Richardson disconnected it causing Quilon to become angry;
7. Mr. Richardson believed him and feared him;
8. Mr. Richardson purchased a vehicle and paid the rent on an apartment for Quilon when he claimed that he couldn't leave due to lack of transportation and inability to pay rent; he still refused to leave.

On the night of the incident, Quilon told Mr. Richardson that he wanted to sleep with his wife; Mr. Richardson told him that he had to leave, to pack his clothes in the car that was in perfectly good shape, load it and go. Quilon raised his voice, cursed Mr. Richardson with profanity, and walked to the shed where tools such as shovels and axes were kept. Mr. Richardson remembered that he had said minutes earlier that should he pull a gun on him, he

would take it from him and use it on him. (T 32-44, 65, 80, 82-96, 96-113; RE 33-43, 47, 48, 49-63, 63-80)

Mr. Richardson used every peaceful means to encourage Quilon to get out of his home, and finally, after dinner one night, as they were talking on the porch, Quilon crossed the final line. He advised Mr. Richardson that he wanted to have sex with his wife, and at that point, Mr. Richardson simply could no longer allow him to stay in the home regardless of any threats and fear. Thus, Mr. Richardson decided to arm himself for protection (due to the state of mind caused by the bragging about his prison experience) and insist that Quilon leave immediately. Mr. Richardson went into his bedroom, picked up his .44 caliber and returned to Quilon in the back yard. Quilon had gone into the shed and appeared to have obtained a weapon, and with his hand behind his back, came at Mr. Richardson. Knowing that Quilon had threatened to take the weapon from him if ever he attempted to pull one on him, Mr. Richardson[3] warned him to stop, and actually fired a warning shot into the ground. When Quilon continued to come after Mr. Richardson, he shot him in the stomach. (T 32-44, 65, 80, 82-96, 96-113; RE 33-43, 47, 48, 49-63, 63-80)

E. Mr. Richardson explained what happened to the 911-dispatcher, and when the responding police officer arrived, he completed the statement to him, although it was not audio recorded like the call to 911 was.

While Mr. Richardson tended to the dying Quilon, he told his wife to call 911. He explained to the 911-dispatch lady what happened, and he tried to explain why it happened.

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[3] While in the bedroom, he told Mrs. Richardson what he was doing. She later gave several statements to the police, with many conflicting facts, and to the extent her statement when testifying was detrimental to Mr. Richardson, she attempted to explain that she was confused. She speaks broken English with a heavy Filipino accent. She gave conflicting statements saying that the warning shot was fired in the air and in the ground; that Mr. Richardson was approaching Quilon, then vice versa; that the distance at the time of the shot was ten feet, then said that they were much closer. (The detective who took her statement with the most detrimental statements was established to be very one sided and biased during his testimony, as will be demonstrated subsequently.) Suffice it to say that the defense would have been better off without her comments, however, it was at least, an issue for the jury.

When the police officers arrived on the scene, the 911 dispatcher told Mr. Richardson to continue his explanation to the officer at the scene. The arriving officer took the phone, spoke to her, and then disconnected the phone. Mr. Richardson did continue to explain, to the arriving officer, what happened and why it happened, but his comments were written down, rather than recorded. Although the first part of his description, recorded by the 911 dispatch call, was mostly a statement that he shot someone, the second half of the statement explained more of the reasons how and why it was self-defense. The 911 call was played for the jury, and it is as follows: (T 32-44, 65, 80, 82-96, 96-113; RE 33-43, 47, 48, 49-63, 63-80)

911 call on 10-20-09 at 21:30 *(***Attorney for Appellant transcribed this from the audio tape which was State's Exhibit #12 played during the trial.)* RE-138A

Dial tone . . .

Mrs. Richardson	crying
Dispatch	911, what's your emergency?
Mrs. Richardson	crying
Mr. Richardson	give me the phone
Dispatch	hello?
Mrs. Richardson	Hello, crying
Dispatch	What's going on there ma'am?
Mrs. Richardson	we have an emergency here (crying)
Dispatch	What's going on?
Mrs. Richardson	Have emergency (crying)
Dispatch	Ma'am, what's going on?
Mr. Richardson	Hello?
Dispatch	what's going on there sir?
Mr. Richardson	I'm at 14192 Old Highway 67
Dispatch	and, what's going on there?
Mr. Richardson	I shot a man
Dispatch	you shot a man?
Mr. Richardson	yes, I did
Dispatch	who did you shoot sir?
Mr. Richardson	Rudy Ramaro, Rudy Quilon. I need an ambulance out here immediately.
Dispatch	ok sir, do you still have, sir listen to me.
Mr. Richardson	he wants to sleep with my wife and he's pushing off on me. He thinks he's tough and all that.

THE REDACTED PART IS
HERE, AS FOLLOWS:

he wants to sleep with my wife and he's pushing off on me. He thinks he's tough and all that **AND HE'S A PRIOR FELON**.

Dispatch	what's your name sir?
Mr. Richardson	Harvill P. Richardson
Dispatch	where did you shoot him at?
Mr. Richardson	In my back yard **as he's coming towards me**.
Dispatch	ok sir, where, where did you shoot him, in the chest, in the back, where?
Mr. Richardson	in the stomach. Get someone here now!
Dispatch	ok sir, we are on the way. I need you to talk to me. Do you still have the gun?
Mr. Richardson	yes, it's in my hand. I'm laying it on the table. I gave him one warning shot and he kept coming towards me.
Dispatch	ok, where's he at now? Is he still in the back yard?
Mr. Richardson	he's laying in my back yard bleeding to death.
Dispatch	ok just stay on the phone with me, ok just stay on the phone.
Mr. Richardson	I'm on the phone. Go open the gate. Open the gate, open the gate! Open the gate for the police.
Dispatch	sir is the gate open? Sir?
Mr. Richardson	I'm having my brother-in-law that was in the house would you please open the gate? Do you have the keys? I'm on the phone. I told him, "don't come towards me anymore."
Dispatch	Who's all there in the house with you?
Mr. Richardson	my wife. My brother-in-law.
Dispatch	anybody else?
Mr. Richardson	open.
Dispatch	ok, sir, where are you in the house?
Mr. Richardson	I'm, I'm on the cordless phone I'm outside now.
Dispatch	in the front yard or back yard?
Mr. Richardson	backyard. I hear the siren, there're opening the gate.
Dispatch	Do you still have the gun with you or is it inside the house?
Mr. Richardson	I laid it on the table inside the house.
Dispatch	ok, stay on the phone with me, we've got everybody on the way, just stay on the phone.
Mr. Richardson	Please hurry, hurry.
Dispatch	sir they, sir they are hurrying okay. Did he have any weapons with you shot him?
Mr. Richardson	I beg your pardon?
Dispatch	when, when you shot him did he have any weapons? You said he was coming at you. Did he have any weapons?
Mr. Richardson	he was coming towards me in a threatening way, and he that uh . . .he says. . ."don't do that, I'll take care of you," and what that meant was . . .
Dispatch	are you, are you near him now?
Mr. Richardson	what?
Dispatch	are you, are you by him now?
Mr. Richardson	(Whispers) I'm outside.
Dispatch	ok, you said you were outside in the back yard. Are you by the guy that you shot?
Mr. Richardson	he's breathing.
Dispatch	he is breathing?

Mr. Richardson	yes ma'am.
Dispatch	is he conscious?
Mr. Richardson	talk to him . . his legs are moving.
Dispatch	(inaudible) copy in the area.
Mr. Richardson	water?
Dispatch	ok, stay on the phone.
Mr. Richardson	the ambulance is here. He wants water. He's asking me for water now.
Dispatch	ok sir, listen to me, just hold on a second, just a second. Ok, don't give him any water until they say it's ok to, ok? Are you, are you talking to somebody? Mr. Richardson?
Mr. Richardson	yes
Dispatch	who are you talking too? Is somebody there?
Mr. Richardson	yes
Dispatch	who's there? Is that a police officer?
Mr. Richardson	there's a police officer here from Biloxi, P.D.
Dispatch	ok, alright, you need to talk to him ok? Mr. Richardson?
Mr. Richardson	yes ma'am.
Dispatch	you need to talk to the police officer okay?
Mr. Richardson	he's here.
Dispatch	I'm gonna get off the phone with you, you need to talk to him.
Unknown, believed to be Police officer:	who's this?
Dispatch	it's, it's Alex with 911. Alright. Bye.

Strangely, when Mr. Richardson tried to explain his reasons for fear and what Quilon said and meant by "I'll take care of you," the dispatcher interrupted him, as follows:

Mr. Richardson	he was coming towards me in a threatening way, and he that uh . . .he says. . ."don't do that , I'll take care of you," and what that meant was . . .
Dispatch	are you, are you near him now?

(T 253-262, 254-257, S-12[4] ; RE 138-147, 139-142, RE 138A)

Additionally, the Trial Judge allowed the Prosecutor, over the objection of the Defense, to redact the words, "and he's a prior felon," as follows: "He wants to sleep with my wife and he's pushing off on me. He thinks he's tough and all that **AND HE'S A PRIOR FELON**." (T 38, 80; RE 39, 47)

At the end of the recording, Mr. Richardson was specifically told by the dispatch lady, "I'm gonna get off the phone with you, **you need to talk to him**." Thus, Mr. Richardson

[4] State's Exhibit S-12 is an audio recording of the 911 call; counsel for Appellant made a transcript (the original recording is with the Harrison County Circuit Court).

continued to explain what happened to the police officer, in more detail, explaining how he was in fear of Quilon and how he used his prior record as a means of intimidation to scare Mr. Richardson from demanding that Quilon vacate the home - all of which, the officer documented in his report. (T 253-262, 254-257, S-12 ; RE 138-147, 139-142; RE 138A)

F. <u>The following factual statement addresses issue "I"</u> : THE TRIAL JUDGE'S GRANTING OF THE PROSECUTOR'S MOTION IN LIMINE PREVENTING ANY MENTION OF QUILON'S PRIOR CONVICTION AND RELATED CONDUCT, OF WHICH HE BRAGGED, TO INTIMIDATE MR. RICHARDSON, IMPACTING STATE OF MIND

The **<u>most important single issue</u>** in this Appeal is the denial at the heart of Mr. Richardson's Self Defense argument. The Trial Judge sustained the Prosecutor's Motion in Limine to exclude the "victim" Quilon's use of his prior convictions and associated conduct while he was in prison to put Mr. Richardson and his family in so much fear, by bragging about what he did, that they would not dare force him to vacate their home until he was ready to do so[5]. The Trial Judge accepted the Prosecutor's argument that under Mississippi Rule of Evidence 608, that the convictions were over 10 years old, that it was an impermissible attempt to use character, and that it was unfairly prejudicial; however, over the five months he resided in the Richardson home, with increasing intensity up to and including the day of the shooting, Quilon bragged about his convictions including his violent behavior while he served time for those convictions. Thus, as Defense counsel argued in the trial, this evidence was not intended to be used to prove character, nor for the truth of the matter asserted, but instead, it was pursuant to Mississippi Rule of Evidence 803 State of Mind exception (T 36, 39, 44, 65, 87, 91, 102, 108, 114, 117; RE 37, 38, 43, 47, 54, 58, 69, 75, 81, 84). The Defense argued that it was imperative to his Self-Defense argument to explain Mr. Richardson's State of Mind, to the jury that, when Quilon made the outrageous statement about having sex with Mr. Richardson's wife, it was the

[5] Please note that the exclusion also included the redaction in the 911 recording played for the jury, as referenced in the paragraph/section above, redacting the words, "**<u>AND HE'S A PRIOR FELON</u>**."

final straw and he was going to make Quilon leave immediately. He was never allowed to explain to the jury that he armed himself because of the fear instilled by Quilon's bragging about his prior record and related conduct, and not because he intended to walk out and shoot Quilon. The Defense argued for this throughout the trial and cited recent Mississippi Supreme Court cases[6] in support of this position (T 200-203; RE 99-102). (T 32-44, 65, 80,82-96, 96-113; RE 33-43, 47, 48, 49-63, 63-80)

Furthermore, as part of the Trial Judge's exclusionary ruling, part of the 911 recording was redacted prior to playing it for the jury to remove Mr. Richardson's reference to Quilon's prison experience as part of the reason he was in fear. The 911 tape, with redaction indicated, is as follows: "He wants to sleep with my wife and he's pushing off on me. He thinks he's tough and all that **AND HE'S A PRIOR FELON**." (T 38, 80; RE 39, 48)

G. The following factual statement addresses issue "II" : TRIAL JUDGE'S REFUSAL TO ALLOW DEFENSE TO ADVISE THE JURY, IN THE OPENING STATEMENT, THAT MR. RICHARDSON CONTINUED TO EXPLAIN WHAT HAPPENED TO THE REPORTING POLICE OFFICER, WHEN THE 911 CALL WAS DISCONNECTED, THEREFORE MAKING IT FALSELY APPEAR THAT HE DID NOT TELL THE POLICE THE REASONS HE WAS IN FEAR, UNTIL MUCH LATER

The Appellant submits the **second most** egregious error in the trial was the Trial Judge's denial of the right to make a proper Opening Statement by presenting a fair and complete summary of what he expected the evidence to show. When the shooting happened, Mr. Richardson called 911, answered questions and made statements to the dispatch lady, as the police/ambulance were en route. When the officer arrived, the dispatcher told him to continue his statement to the officer on the scene. That officer took the phone, spoke briefly to the dispatcher, and disconnected the phone. In a continuous statement, Mr. Richardson continued to describe what happened after the 911-recorded call was disconnected. (T 229-241; RE 124-136)

[6] Sanders 209-KA-1925; and Newell 49 So3d 66 (T 200-203; RE 101-102)

The first part of the statement, recorded by 911, contained the basic facts, and when he attempted to describe why he was in fear, the dispatcher actually interrupted him and asked other questions. The part of his statement that continued after the telephone disconnection, was made to the officers explaining his reasons for being in fear in more detail. Although the Trial Judge's ruling on the State's Motion in Limine barred most of the reasons that he was in fear and why he armed himself before confronting Quilon and insist that he leave, Mr. Richardson still had the right to tell the fact that Quilon went to the shed where his axe and shovel were kept and that Quilon appeared to be carrying something. (T 229-241; RE 124-136)

Although the Prosecutor was able to describe the 911 call in his Opening Statement (T 223-224; RE 122-123), the Prosecutor objected to the Defense's attempt to present the summary of expected evidence, arguing that allowing Mr. Richardson to not only say that he was in fear, etc., but that saying it to the police, gave it greater credibility and weight and was improper bolstering of his own statement. The Defense agreed that things said to the officers contemporaneously with the events carry greater weight, as opposed to a statement given much later, or at a time after an attorney has been retained and consulted, and the Defense argued that that is why it was crucial to the defense to advise the jury what Mr. Richardson did and said; and further, that since it was a continuation of the statement, it was only fair to give a complete statement rather than only the 911 recorded portion. (T 229-241; RE 124-136)

Additionally, the Trial Judge (recently appointed as Circuit Judge, having recently been a Harrison County Prosecutor), submitted several times to the Defense that if he allowed the Defense to summarize what Mr. Richardson said to the officer with respect to his fear and self-defense, then in the event that the Defense chose to not put Mr. Richardson on the witness stand, then the Prosecutor would have no way of rebutting the evidence. The Defense argued that either they had the right to make an Opening Statement or not, and that if they failed to produce

the evidence promised in the Opening Statement, then the Prosecutor had the right to reveal that fact to the jury in his Closing Argument. The Trial Judge[7] sent the jury out, rudely, and appeared angry in front of the jury, chastised the Defense Attorney by refusing him the right to make a proffer, telling him to sit down several times, and told him that he would send the jury out and teach said attorney "the rudimentary rules of evidence (T 237; RE 132)." (T 229-241, 311-315; RE 124-136; 196-200)

More specifically, the statement was as follows: The Defense said to the jury that, after the arriving police officer took the telephone away from Mr. Richardson, he continued to explain what happened and in more detail, why he was afraid of Quilon. The Prosecutor objected, and said that by "boot strapping potential statements by the defendant to be of a higher value because they were taken by police officers." (T 232; RE 127) The Defense agreed, because greater weight is given to statements made by a Defendant to officers at the time of the event, rather than at a later time after he has consulted with counsel. The Trial Judge advised Defense counsel that "you know full well of the ramifications of you placing the statement to the jury with regard to whether he is going to call the defendant to the stand or not (T 230; RE 125); and you can place into the record and to the jury all the statements that your client made, the defendant, without the state knowing if they are going to have an opportunity cross the defendant or not." (T. 234; RE 129) (T 229-241; RE 124-136) The Trial Judge was protecting the State at the expense of the Defense's right set forth what they reasonably anticipated that the evidence would be, but the Trial Judge denied this due process, and stated:

8 THE COURT: And I think the problem, Mr.
9 Crosby, you used the key word "evidence." Is
10 opening statement where you present evidence to
11 the jury?

[7] The Trial Judge did other things during the opening which will be described as judicial misconduct in the later portion of this Brief.

12 MR. CROSBY: **It's where we present a**
13 summary of what we reasonably expect the
14 evidence to be.
15 THE COURT: Do you feel that if you can't
16 present it to them during the course of the
17 opening statement you are denied from presenting
18 it to them through the course of trial?
19 MR. CROSBY: I think I have a right to --
20 THE COURT: But do you feel you are denied?
21 MR. CROSBY: I'm sorry?
22 THE COURT: Do you feel you are denied? If
23 you don't present it to them in the opening
24 statement, are you denied from presenting it to
25 them during the course of the trial?
26 MR. CROSBY: No, sir, I sure can.
27 THE COURT: Fine. Have a seat. Sit down.
28 MR. CROSBY: May I please comment on it?
29 THE COURT: Sit down. Bring the jury in.
(T 240; RE 135)

The rulings confused the Defense Attorney, a veteran of 27 years of trial practice, and the judge told him this:

THE COURT: The objection is sustained.
8 Let's bring the jury back in.
9 MR. CROSBY: Let me make sure, I'm not
10 going to be able say anything out of my client's
11 mouth, is that what we're doing? I can't say
12 anything my client said? We are just going to
13 be stuck with what they present and I can't say
14 anything, correct?
15 THE COURT: Is that really, in your
16 experience, the understanding of the ruling of
17 the court? Really?
18 MR. CROSBY: I will really tell you I don't
19 know what you are ruling. I'm saying that with
20 all due respect, with ultimate respect for the
21 bench and the robe.
22 THE COURT: **Let me get the jury back out**
23 and we will go over the rudimentary principles
24 of the rules of evidence with regard to the
25 statements made by the defendant and whether you
26 can introduce them unilaterally or not.
(T 237; RE 132)

At this point, such public comments against the Defense Counsel, especially since the comments were clearly erroneous, caused the trial to be fundamentally unfair, and created an atmosphere of contempt against the Defense, thereby denying the Defendant his right to a fair trial.

H. (a) <u>The following factual statement addresses issue "III"</u> : THE CONTINUOUS AND OVERWHELMING DISPLAY OF JUDICIAL BIAS, PROSECUTORIAL MISCONDUCT, BOTH SEPARATELY AND COMBINED (CUMULATIVE EFFECT), DENIED MR. RICHARDSON'S RIGHT TO A FAIR TRIAL)

--PROSECUTOR'S ATTEMPT TO CONCEAL GUNSHOT RESIDUE TEST RESULTS (GSR) AND JUDGE'S CHASTISING DEFENSE FOR PROSECUTOR'S ATTEMPTED DECEPTION; (related to Issue III. a.)

At one point, the trial was set to begin on March 21, 2011. The above referenced Motion in Limine was faxed to Defense Counsel in a 19-page facsimile. The fateful Motion proved to be so significant that it basically prevented the "state of mind" evidence so necessary to the defense, and it was very important. The Motion has numerous exhibits, and at the very end, it contained three pages – and those pages were the results of the GSR test administered on the night of the shooting, but not disclosed until 32 days before the trial setting. The reports indicated that Mrs. Richardson's palms and the back of one had were covered in gunpowder; whereas, the hands of Mr. Richardson and Quilon had no gunpowder whatsoever[8]. This directly contradicted the Self-Defense argument, and was evidence that Mr. Richardson may be taking the blame for Mrs. Richardson. Typically, the State requires the Defense to sign for any supplemental discovery material, and in the least, would call to mention something significant; however, other than surreptitiously transmitting the reports on the back of a lengthy and important Motion in Limine, there was no notice. The Defense almost failed to take note of the reports as GSR was not a consideration, until then. The Trial Judge did grant a short continuance, however, he chastised

[8] Because the GSR evidence conflicted with the defense, the Defense elected not to produce an expert which would have been necessary to sponsor any particular conclusion regarding how Mr. Richardson had no GSR whereas Mrs. Richardson's hands were covered – except to the fact that it was on her hands, and to the extent that the obvious possible contradictory defense.

the Defense, not the State, for submitting that a continuance was needed for the newly discovered evidence, and the Trial Judge stated that he did not consider it "newly discovered," (T 20,27; RE 24, 31) that apparently the rules did not apply to Defense counsel, (T 27-28; RE 31, 32) and threated sanctions (T 27-28; RE 31-32). This was the first indication that the Trial Judge, recently appointed as Circuit Judge, (formally a prosecutor and frequent opponent of the Defense Counsel) was going to demonstrate what is respectfully submitted as bias against the Defendant. (T 10-28; RE 14-32)

H (b) JUDGE'S REFUSAL TO GRANT A CONTINUANCE WHEN MR. RICHARDSON'S HEARING AIDS FAILED, AND REQUIRING HIM TO WEAR RIDICULOUS HEADPHONE EQUIPMENT (related to Issue III. b.)

During the trial, Mr. Richardson began experiencing difficulties with his hearing aids[9]. The Trial Judge first noticed the problem, during Mr. Richardson's proffer, and ordered him to make sure to fix the problem. (T 209-214; RE 108-113) Overnight, the Defense Attorney struggled to communicate with the Defendant. It was determined that Mr. Richardson's hearing aids malfunctioned, and they were intermittently functioning – thus, causing him to experience complete hearing loss for portions of the trial, making it impossible for him to assist his counsel. This was reported to the Trial Judge, who became openly upset about this problem, and he criticized Mr. Richardson for not having properly functioning hearing aids. He made an on-the-record finding that he thought that Mr. Richardson could hear just fine, (i.e. that he was faking) but out of an abundance of caution, ordered audio assistance, which consisted of big ear covers that blasted sound into Mr. Richardson's ears. While this seemed to have been a solution, in practice, it made it impossible for the Defendant to assist his attorneys. Although he could hear, he could not communicate with his attorneys. He could not whisper because his hearing was

[9] During his service to his country in the Vietnam war, the loud noise associated with explosions, ruined Mr. Richardson's ability to hear, and he could hear properly only with the use of hearing aids.

adjusted for the loudness, and the attorneys could not speak to him because his ears could hear only through the courtroom microphone equipment. Numerous times during the trial, the judge scolded Mr. Richardson for talking too loudly, ordered the attorneys to develop hand signals for him, and even sent the jury out once when he was trying to communicate with his attorneys, while a witness was testifying[10]. The irritation of the Trial Judge was evident to everyone, including the jury, which prejudiced the Defendant's right to a fair trial.

On one hand, Mr. Richardson's hearing aid worked intermittently, and it was impossible to predict when they would or would not work. On the other hand, the ear covers made him hear the witnesses, but made it impossible to communicate with his attorney. The attorneys moved for a continuance to allow him to see his doctor to repair or replace the original hearing aids and moved for a mistrial when the Trial Judge's solution proved even more problematic. Both Motions were denied. (T 120, 204-221, 300, 310-311, 331- 333; RE 87, 103-120, 185, 195-196, 216-217)

When the problem was first announced, and while the parties were waiting the arrival of the audio enhancers, both the prosecutor and the Trial Judge made an observation concerning the proffer by Mr. Richardson. They indicated that Mr. Richardson was pretending to not be able to hear the prosecutor's questions, but heard the Defense Attorney's questions and the redirect (his attorney) without a problem. As the record will show, and contrary to the Prosecutor and the Trial Judge's erroneous observations, the Defendant answered the Prosecutor's questions without

[10] During Inv. Brown's cross-examination, the Trial Judge told the attorneys "You need to talk to your guy about the hand signals."(T 300; RE 184) which is difficult to do in the middle of a Murder trial. Further, this continued throughout the trial, and the Judge directly scolded Mr. Richardson telling him that he should remove the head phones if he needs to speak to counsel, and to lower his voice as his speaking is adjusted to the louder head phones, and the judge claimed that this method as time proven, but counsel explained that when he removes the device, he might be able to speak to his counsel, but he can't hear the witness, and vice versa. (T 330-333; RE 214-217) Finally, all this impacted the jury's perception, as the Trial Judge was clearly angry and irritated with the Defense.

any issues, and there was no "redirect." The judge made several additional erroneous observations, as set forth below.

The Prosecutor's and Trial Judge's statements were as follows:

12 MR. WARD: I would just note that, during
13 the course of the direct examination while the
14 defendant was on the stand yesterday, he didn't
15 appear to have any problem whatsoever with
16 questions that Mr. Crosby asked. However, he
17 had a great -- he appeared to indicate that he
18 had some hearing problem with the questions that
19 I asked. But ultimately, he was successfully
20 able to hear everything that I did ask of him.
21 But it was a notable difference between the
22 questions that Mr. Crosby asked that might be
23 helpful to the defense, and his reaction to the
24 cross-examination questions that might not be
25 helpful to his defense.
(T 211; RE 110)

The Trial Judge likewise, made the following observations:

3 THE COURT: Just as a matter of record, I'm
4 going to note that the matter was called by this
5 court during the docket call, and the court
6 noted that the defendant rose when the court
7 announced the style of the case. So he
8 apparently had no problem hearing the court at
9 that time. I'm also going to note that
10 throughout the duration of voir dire whenever it
11 was announced for the defendant to stand, which
12 happened on more than one occasion, he indicated
13 no problem hearing at that part as well, and he
14 complied. So he didn't appear to have any
15 audible difficulty at that time. And I am going
16 to note for the record that during the
17 defendant's proffer, the court observed the
18 defendant appeared to have no problem at all
19 hearing the direct examination from his own
20 counsel of record. I did note that, immediately
21 upon cross-examination, he gave the impression
22 that he was having trouble hearing the
23 cross-examination. However, on the
24 re-questioning he appeared to hear the
25 cross-examination questions fine. And I will
26 note, on the court's own inquiry during the

27 proffer, he understood the court, my questions
28 clearly, concisely, without giving any
29 indication whatsoever that he had any trouble
(T 214; RE 113)
1 hearing the court's voir dire at all.
2 However, out of an abundance of caution,
3 you are correct, Mr. Crosby, I am not going to
4 continue this case. This case is going to
5 proceed to its conclusion this week. I will
6 provide audible assistance that's being
7 transported to the courthouse at this time, and
8 your client can be seated at table with
9 earphones on that will relay to him everything
10 that's going through the microphone system.
(T 213-214; RE 112-113)

The above demonstrates an extreme opinion, that if true, would indicate dishonesty and an attempt to deceive the court. However, when one looks at the transcript, they were flat out, positively, absolutely wrong – not only in their alleged observations, but also in participating in a trial where a man's life was on the line, with such erroneous opinions. Below, the portion of the proffer (excluding the "direct testimony" as they did not complain about that) to which they derogatorily and erroneously described. (T 96-113; RE 63-80)

5 CROSS-EXAMINATION (T 109-112; RE 76-79)
6 BY MR. WARD:
7 Q. Mr. Richardson, you keep talking about
8 discovery. That's the written criminal history and other
9 things that were provided to you by your defense counsel;
10 is that correct?
11 A. The discovery, repeat that, please.
(T 109; RE 76)

In all fairness, what is the Prosecutor asking: first, he makes a statement telling him that he keeps talking about discovery; then the Prosecutor explains what discovery is, and then says that was provided by your counsel. So, is the question asking for a definition of "discovery," or is the question whether his attorney provided discovery, or is it asking him to agree that he keeps talking about discovery. Further, this is the first question presented to him in a Murder trial

against him – perhaps he is a little nervous. A correct response would be difficult under the best of circumstances.

The next question:

12 Q. You made reference to the discovery a few times.
13 That's the criminal file that you were provided after you
14 were charged with this, correct?
15 A. That is correct.
(T 109; RE 76)

Richardson answered the question. Next question:

16 Q. Well, Mr. Richardson, on October 20th of 2009,
17 on the date that you killed Mr. Quilon, what did you know
18 about his criminal record?
19 A. Only what he had stated.
(T 109; RE 76)

A question was asked, and Richardson tried to answer, but he was cut off as follows:

20 BY MR. WARD: Q. And he had stated –
21 MR. CROSBY: Objection Your Honor, he cut
22 him off. He said only what he had stated. He
23 was trying to speak to tell what he had stated
24 and Mr. Ward cut him off.
25 THE COURT: Did you finish your answer?
26 THE WITNESS: Only what he had stated about
27 the people he had killed and the things he had
28 done as a gang member in San Diego, which I had
29 no idea that he went to prison for that, too.
(T 110; RE 77)

So far, Richardson has done the best that anyone can. The next question:

1 BY MR. WARD:
2 Q. Mr. Richardson, as you know, the event that
3 we're here on occurred October 20th of 2009, right?
4 A. What date?
5 Q. October 20th of 2009?
6 A. The events that night, yes, they happened that
7 day. That day, not after.
(T 110; RE 77)

Other than making sure of the date, which probably took a second to be certain, he answered the question after making sure what was asked.

8 Q. When did the victim tell you that he had killed
9 a young lady and killed his cell mate and he was a gang
10 member? When did the victim tell you that he had killed
11 these people?
12 A. He had mentioned that over the months, and he
13 would add a little more. And why I don't know, maybe it
14 was for intimidation purposes for my wife and I.
(T 110; RE 77)

In this question, the Prosecutor was no longer asking about the last time the bragging about killing took place, but instead, when did it take place. With absolutely no evasiveness whatsoever, Richardson answered the question as well as he could. It is clear, that exactly as he had testified in his direct, during the several months that Quilon was in the residence, he began to make claims of past violence, bragged about killing, etc., right up to the time of the incident.

15 Q. Well, in relation to October 20th of 2009, when
16 was the last time that the victim told you that he had
17 killed someone?
18 A. That night.
(T 110; RE 77)

Again, the question was directly and clearly answered.

19 Q. That night?
20 A. Yes, sir. He told me if I pulled a gun on him,
21 he would take the gun from me and use it on me, that
22 meant to kill me, that night, I would –
(T 110; RE 77)

Saying, "That night?" was not exactly a question, but he was actually repeating what Richardson just answered. After answering the question for a second (perhaps third) time, Richardson added for illustration that during the bragging about his past kills, Quilon threatened him that if Richardson pulled a gun on him, he would take it away and use it on Richardson. The Prosecutor cut him off in the middle of a sentence, and then asked:

23 Q. No, sir, we're talking about the prior events
24 that the victim might have done, that he might have
25 killed other people. When is the last time he told you
26 that he had killed other people?

27 A. I will have to think on that, because it's
28 October. I think it was probably a day or few before,
29 and he talked about using automatic weapons. And he told
(T 110; RE 77)

1 me if anything happened to me, (Rudy Quilon) his people would take care
2 of me. (Mr. Richardson) And he laughed at me and says, but don't worry,
3 you won't feel it, it will be through the back of your
4 head.
(T 111; RE 78)

Sometimes a person can't remember everything exactly when it happened, especially when it is over several months and especially when it involves something horrific. But Richardson did answer, as well as he could, saying that it "was a day or few before" and then he added what he thought was appropriate to put it in context by explaining that he, Richardson, was getting explicit threats to his life mixed in with Quilon bragging about killing other people. Rather than being evasive, he was answering the questions and giving even more information because it put everything into proper context.

5 Q. And you are saying a few days before he said
6 that he had killed other people, is that what you are
7 saying?
8 A. Many days before that and he would add to his
9 story month after month.
(T 111; RE 78)

Had the Prosecutor been listening, he would have heard Richardson explain that over several months, right up to the incident, the threats were made, and the threats escalated in detail as it got closer and closer to the incident.

10 Q. Okay. And what did the -- we've heard that you
11 have no criminal history and a good Christian. What did
12 the police say about what the victim had told you prior
13 to the killing?
14 A. What?
(T 111; RE 78)

This is the only time that Richardson simply did not completely understand the question. The Prosecutor begins with an incomplete sentence, "and what did the . . ." then he switches

gears and then says, "we've heard that you have no criminal history and a good Christian," which is not a complete sentence, and definitely is not a question. The he asks a question that has absolutely nothing to do with either of the first two incomplete sentences preceding the next sentence, which makes no sense whatsoever. Mr. Richardson, a 68 year old man at the time of this proceeding, inexperienced in the criminal process, responded with an appropriate, "What?" The criticism given to Mr. Richardson by the Judge and Prosecutor for this series of "questions," is unfair, unjustifiable, unwarranted, twisted, jaundiced, and simply reflects a predisposed opinion with no basis in reality. The questioning continued:

15 Q. Did you report it to the police, sir?
16 A. Yes, I called them. I asked for help. I asked
17 for an ambulance and the police.
(T 111; RE 78)

The question was asked, and immediately answered; however, the Prosecutor wanted more.

18 Q. No, sir, during the five months that the victim
19 stayed at your house, before he was killed, you have
20 testified that on numerous occasions, the victim is
21 telling you that he is a killer and he will kill again,
22 and that he will hurt your family, correct?
23 A. No. He didn't tell me at that time. He always
24 left it to be assumed that he would hurt me or my family.
(T 111; RE 78)

The Prosecutor started out by disagreeing with the answer, then spouted off a series of statements, but Richardson, logically, started with the last statement in the series and responded by explaining that as far as killing him and his family, that that was left to be assumed; whereas, by contrast, the killing of him would be if he pulled a gun, and the other discussions of killing was with regard to his bragging about all the killing he was involved in. The "victim" never directly said, "I will kill you or your family," but it was always alluded to as a form of intimidation to prevent his removal from the residence. Mr. Richardson was trying to be specific in answering the questions, but rather than ask an understandable follow up question to seek

clarification, the Prosecutor blurted out:

25 MR. WARD: Nothing further, Your Honor.
(T 111; RE 78)

This is where the Judge confused the word "parole" with "being in prison", as "parole" is not "prison" and just because someone was formally in prison, does not mean that he is on "parole." Richardson knew that Quilon had been in prison, but did not know that he was on parole until a later time when he mentioned paying a parole officer $50.00

26 THE COURT: Mr. Richardson.
27 THE WITNESS: Yes, sir.
28 THE COURT: **You knew he was on parole**
29 before he moved into your house?
(T 112; RE 79)

1 **THE WITNESS: No, I did not.**

--and further

2 THE COURT: You just testified earlier, I
3 thought, that he had been kicked out from
4 another place after he was out on parole?
5 THE WITNESS: He was kicked out of his
6 daughter's home. And I didn't know the system,
7 parole and all of this. And then he told me
8 that he had to pay a parole officer $50.
(T 112; RE 79)

Richardson found out that Quilon had been kicked out of his own daughter's home and was on parole after he moved into Richardson's home, but again, being in prison does not mean, for a fact, someone is on parole.

9 THE COURT: This is after he moved into
10 your home?
11 THE WITNESS: Yes, sir.
12 THE COURT: So you allowed him to move into
13 your home because he was homeless?
14 THE WITNESS: That's the only reason.
(T 112; RE 79)

The only reason Quilon was allowed to temporarily reside in Richardson's home was

because he was homeless. The reason he was homeless Quilon claimed, was that he had been in prison and could not get a fair shake, but he had changed his ways and wanted to be Christian.

15 THE COURT: Okay. You referred to it as
16 his computer?
17 THE WITNESS: That Norm Sear gave him his
18 computer.
19 THE COURT: So he had his computer in your
20 residence?
21 THE WITNESS: Yes, in a bedroom.
22 THE COURT: Is that the bedroom that he
23 resided in?
24 THE WITNESS: Yes, Your Honor. And a lock
25 on the door.
26 THE COURT: And a lock on the door?
27 THE WITNESS: Yes, sir.
28 THE COURT: Okay. You may step down, sir.
29 THE WITNESS: Thank you, Your Honor.
(T 113; RE 80)

The above absolutely and clearly establishes that Mr. Richardson answered the questions, with no indication of evasiveness, directly contrary to the description given by both the Prosecutor and the Trial Judge. This is a clear sign that the judge is predisposed to view the Defendant in a bad light. A few additional demonstrations of this terrible problem is evident by the last few questions the judge asked. Immediately following this proffer the judge made the following two ERRONEOUS observations.

29 THE COURT: I don't know -- **your client**
1 just stated he did not know that he was a
2 convict prior to him entering and him allowing
3 him to reside in his residence. And your client
4 unequivocally stated that the only reason why he
5 allowed the victim to live with the defendant is
6 because he was homeless.
(T 116-117; RE 83-84)

Because the Trial Judge had an apparent bias against the Defendant, he would hear things wrong. Mr. Richardson said he did not know Quilon was on parole (T 112-113, line 28-1; RE 79-80) at the time, which is different than saying that he "did not know that he was a convict

prior to him entering and allowing him to reside in his residence." (T 116, line 1-3; RE 83). Additionally, the Trial Judge based his ruling to exclude the prison record and associated conduct while incarcerated as being bragged about to remote in time, specifically, the Trial Judge said:

25 Court's ruling remains. I will also note that
26 the defendant stated that the last statement to
27 that effect allegedly made by the victim **was**
days before the incident for the basis of the
29 indictment that we are here for today.
1 **So based on the remoteness of time, as well**
2 as the prejudicial effect, the ruling stands.
(T 116-117; RE 83-84)

But, that is not what the Defendant just told the judge, literally minutes before those words came from the Trial Judge's mouth, in response to the Prosecutor's questions, just prior to the judge's very own questioning, Mr. Richardson said that it not only over the five months, but also that very night, as follows:

Prosecutor:

15 Q. Well, in relation to October 20th of 2009, **when**
16 was the last time that the victim told you that he had
17 killed someone?
18 A. That night.
19 Q. That night?
(T 110; RE 77)

The Trial Judge's negative predisposition and opinion apparently was making him hear things that were not actually said, and did not hear things that were said, throughout the trial (selective hearing). For instance, the Trial Judge said that Mr. Richardson had no problem answering the questions asked on "redirect," but there was no redirect. The judge said that the intimidation was "days" before the shooting, whereas the response was that it was including "that night." Further, the judge could not distinguish between "being on parole" and "having

been in prison." The observations are simply not established by the description of the proffer by the Prosecutor and Trial Judge. (All cited above) (T 96-125; RE 63-92)

H (c) JUDGE'S ASKING WITNESS TO REPEAT TESTIMONY CONCERNING BELIEF THAT MR. RICHARDSON HAD BEEN DRINKING ALCOHOL (related to Issue III c)

During the testimony of the State's first Investigator, Michael Brown, as he was describing the interview of Mr. Richardson, the Investigator said that it appeared that Mr. Richardson had been drinking alcohol – usually considered a negative factor. The Trial Judge interrupted the testimony and had the response repeated to improperly highlight it for the jury[11] as follows:

19 Q. All right, sir. During the course of your
20 investigation, did you have some contact with the
21 defendant that night?
22 A. Yes, sir.
23 Q. Did he smell of alcohol?
24 A. I did smell alcohol on him.
25 THE COURT: **Hold on one second. I didn't**
26 understand what you said. Repeat your answer.
27 THE WITNESS: **Yes, sir, he did smell of**
28 alcohol.
(T 267-268; RE 152-153)

The sting and undue attention of the alcohol allegation was hammered home twice, due to the repeating at the behest of the Trial Judge himself. While it may not seem that significant, when all issues are combined, a scowl from the judge, has enormous effect on the jury's attitude and view.

[11] Although there was no contemporaneous objection, the Defense was having enough trouble with the judge, and was somewhat desperate; nevertheless, a mistrial motion was subsequently made, when it appeared the trial was hopeless, at a later time. (T XXX; RE XXX)

H (d) (1) BOTH PROSECUTOR AND JUDGE'S COMBINED MISCONDUCT AND BIAS CONCERNING:

--INV. BROWN'S TESTIMONY (related to Issue III. d. 1.)

Every major felony case has a "lead" investigator; thus, if the State's witness who testifies in court admits that he is the "Case" or "Lead" Investigator for the case, then he should be knowledgeable about the facts of the case, and should thereby have answers to all relevant questions about the case. Furthermore, he would be the individual in charge of assembling all documents, witness and such, and at trial, he would be able to sponsor into evidence everything under the business record exception to the hearsay rule of evidence – 803. In the case at bar, Inv. Mike Brown was the person who was assigned, randomly, the task of "Lead" investigator, and he began he began the investigation on the night of the shooting, interviewing every key witness and collecting all evidence[12]. He began his testimony by denying that he was the "Lead" or "Case" Investigator, without qualifying or explaining his response. Upon cross-examination, he reluctantly admitted that he started out as the lead, and admitted that he did every essential and important part of the investigation; however, for some unexplained reason, the title was shifted to another Investigator/ co-worker, Darden, and he was then considered merely an investigator. At trial, Darden was unavailable, for reasons never revealed. Mike Brown came to court with the complete file, and took the witness chair with the case file in his lap. In essence, the only relevant tasks he did not perform was to (1) receive the lab results of the GSR, although he performed the test that collected the evidence; and (2) did not subpoena the phone records of Quilon to secure the photographs taken of Mrs. Richardson on Quilon phone, although he did collect the phone itself. The following questions and answers will demonstrate that the only reason that the "title" of being "lead" investigator was to prevent the Defense from being able to

[12] --including the cell phone of Quilon, the importance of which will be explained shortly hereafter.

have the GSR results and Photographs from Quilon ' cell phone admitted into evidence. The pertinent selections of the transcript are as follows: (T 262-315; RE 147-200)

Upon taking the witness stand, on direct, Inv. Brown answered the Prosecutors questions as follows:

4 BY MR. WARD:
5 Q. State your name and by whom you are employed.
6 A. Michael Brown. I'm an investigator with Biloxi
7 Police Department.
8 Q. If you would speak up. I understand you had a
9 root canal yesterday?
10 A. Yes, I did.
11 Q. Would you explain what you -- in what capacity
12 you serve the City of Biloxi?
13 A. I'm an investigator in the violent crimes
14 division.
15 Q. And you are called, on occasion, to assist in
16 homicide investigations, correct?
17 A. Yes, sir.
18 Q. In this particular case, you are not the lead
19 investigator[13], but you did participate, correct?
20 A. Yes, sir.
(T 262; RE 147)

Thus, it would appear that he was not the "lead" investigator, assuming that the Prosecutor is presenting an honest and non-deceptive case to the Jury. Knowing the involvement of Investigator Brown, and having seen where the file reflected that Brown was the "lead" investigator on the case, the Defense Attorney was slightly perplexed, as the following questions demonstrate – at first.

2 Q. Well, you **are the case investigator, the**
3 investigator assigned to this case, right?
4 A. No, sir.

[13] 20 Q. Again, not being lead investigator, but an
21 investigator, in essence, the statement made by Ms.
22 Richardson was that she was present and she witnessed the
23 event, correct?
24 A. Yes, sir. (T 267; RE 151) The Prosecutor's question, is actually, a statement that Inv. Brown was not the "Lead" Investigator –soon to be proven a false claim, as established by Brown himself, on cross-examination. (T 297 line 13; RE 180)

5 Q. **You are one of the investigators assigned to**
6 this case, right?
7 A. No, sir.
8 Q. **You haven't been assigned to this case?**
9 A. No, sir.
10 Q. Okay. Are you testifying concerning the case
11 the State of Mississippi versus Harvill Richardson?
12 A. Yes, sir.
13 Q. Are you relying upon your experience as a police
14 officer to document correctly what you heard and what you
15 have observed?
16 A. Yes, sir.
17 Q. Would you agree that you are the Investigator
18 Brown that's referred to on the tape recording that's
19 been marked for identification?
20 A. Yes, sir, that is me.
(T 271; RE 156)

Yes, Inv. Brown just testified, under oath, that he was not an investigator on this case, and that he was not assigned to this case, but yet, he did investigate. Please, continue to read:

Skip to (T 282; RE 167)

5 Q. **Now, who was the investigator, in your opinion,**
6 on this case? Who had the lead role?
7 A. Well, I would have during that time right then.

Please note the flip-flop and deception. When he testified earlier, he did not explain his answer, therefore, he and the Prosecutor, allowed the jury to have incomplete information with respect to a key part of the case, thus – intentional deception.

8 But it was assigned to somebody else because I --
9 Q. So now we've got you being an investigator when
10 it was being investigated, and you are not the
11 investigator now, is that your testimony?
12 A. Well, the investigation never stopped. I mean,
13 right then. I mean, I was the investigator then. Case
14 file assignments are not based on, I guess -- I don't
15 know what you are trying to say.
16 MR. CROSBY: Your Honor, at this time I
17 would submit that I may need to make -- I don't
18 want to waive it by continuing it, but I may
19 need to make a record concerning prior questions
20 that I asked based on his position as the
21 investigator. And, I think, in all fairness, if

22 he was the investigator, and when I'm asking my
23 questions based on what the investigator would
24 do, whenever he responded, he said he was not
25 the investigator.
26 THE COURT: Why don't you develop his
27 answer fully to determine what he means by the
28 investigator at the time as opposed to lead
29 investigator assigned the file. And then you
(T 296-297; RE 181-182)

1 can review your motion.
2 BY MR. CROSBY:
3 Q. Did you hear our honor?
4 A. No, if you would explain your question again.
5 Q. I need to know -- we need to know what you are
6 talking about when you say that you are not the
7 investigator, but at the time you were the investigator?
8 A**. I never said I was not the investigator.**
9 Q. Okay. Who was the investigator on this case at
10 the time it was being investigated?
11 A. **Well, there was more than one. I was one.** I
12 was initially called out**. I think Deback was there,**
13 Sergeant Deback. He was there, and I don't remember who
14 else was there.
(T 297; RE 182)

Brown was one of the two investigators put on the witness stand by the State in this Murder trial. Deback and Darden were not available for this trial. Brown had the case file in his lap. Mr. Richardson's life is on the line. The jury was looking to this witness for truthful information. Investigator Brown just testified that he "**thinks** Deback was there" at the time.

In the next several pages, Defense counsel attempted to probe whether there was an expressed and documented expression of bias. The questions were stopped, and the attorneys called to the bench. Defense counsel proffered that he listened to a witness recording, made by the Investigator Darden, who unequivocally stated that he was going to get a conviction and fight for the maximum punishment. If Inv. Brown was working under another Investigator, or working hand and hand with one who expressed such one sided bias, expressions of such intent, would influence his impartiality. The Trial Judge refused to allow the exploration of bias on

cross-examination of Inv. Brown. (T 297-300; RE 182-185)

Having been cut off from such attempt to explore "bias" of the witness, the Investigator can now claim a lack of knowledge concerning other critical and essential areas that the Lead Detective should know in any case under his supervision, especially a Murder case.

12 Q. With respect to -- let me ask you this. In the
13 beginning, do you agree that you were the chief
14 investigator, the main investigator who was charged with
15 trying to put everything together in this case?
16 A. In the very first few hours, maybe.
17 Q. Who was the investigator when it came to light
18 that Harvill had no GSR residue on him and Ms. Edith had
19 it all over her hands, who was the investigator at that
20 time?
21 A. It would have been Bobby Darden, Lieutenant
22 Darden.
23 Q. So you don't know what, if anything, was done to
24 follow up on investigation after that came to light, do
25 you?
26 A. No, sir.
27 Q. You don't know if he tested anymore clothing or
28 followed up with anything, do you?
29 A. No, sir.
(T 301; RE 186)

In the next set of questions, the Defense counsel asked Inv. Brown if he had the pictures downloaded off the cell phone of Quilon, with him on the witness stand, and he confirmed that he did. He did not remember if he actually requested the subpoena for the download, but he did say the following:

20 Q. I'm going to hand you what are some of the
21 subpoenas, apparently in the Cellular -- or to Cellular
22 South in this case. Does that refresh your memory as to
23 whether or not you were the one who physically subpoenaed
24 the records?
25 A. If I would have physically subpoenaed it, it
26 would have had my name on it, but it's got Lieutenant
27 Bobby Darden's name on it.
28 Q. But as part of your investigation, do you agree
29 that this was done?
1 A. Yes, it was done.
2 Q. And that was part of the investigation?

3 A. Yes, sir.
4 Q. And in that part of the investigation, did you
5 have, from the phone records of the deceased, numerous
6 pictures of Ms. Edith in various poses?
7 MR. WARD: Objection, Your Honor.
8 THE COURT: It's sustained. The objection
9 is sustained.
(T 305-306; RE 190-191)

Thus, despite the fact that Inv. Brown was admittedly part of the Investigation, the Trial Judge sustained the Prosecutor's objection to the admission of the photographs[14] of Mrs. Richardson. Because of the flip-flopping of Brown's testimony, the Prosecutor attempted to rehabilitate him as follows:

11 Q. So you are an investigator and you did do some
12 investigating in this case, but you are not the lead or
13 case investigator, right?
14 A. No, sir.
15 Q. So we're not trying to hide anything, that's
16 just your title and what you've done, correct?
17 A. Yes, sir. And, I mean, I will try to explain it
18 if you want me to explain it to the jury, is that the
19 case file assignments are based on like I may have had
20 another murder that I had, so they would assign it to
21 somebody else, even though I got called out and worked on
22 it. But we all just kind of work on it together. But
23 like Mr. Ward said, that's what eventually happens, it
24 gets assigned to a case investigator, and then he is
25 responsible for preparing everything and sending it to
26 the district attorney's office.
(T 308-309; RE 193-194)

Thus, depending upon who was asking the questions, Inv. Brown's responses changed dramatically. As an example of the continuous interruptions, and strange objections, which were actually SUSTAINED, one of many instances of difficulty (demonstrating bias of both Judge and Prosecutor) was as follows:

7 Q. You are aware of, in preparing for your case
8 today, you are aware of Mr. Richardson saying that Rudy

[14] These pictures would depict a familiarity of Mrs. Richardson and Quilon, which would go toward the issue of the GSR and the possibility that Mr. Richardson did the shooting.

9 was coming after him and would not stop. In other words,
10 it was more than just one step, according to Mr.
11 Richardson?
12 A. I know he said that, but Ms. Edith didn't.
13 Q. Well, would you agree that in trying to help the
14 state's case --
15 MR. WARD: Objection, Your Honor, as to
16 pitting the witness and it's redundant and
17 repetitive.
18 THE COURT: Sustained. Move on.
(T 280; RE 165)

The witness, not the Attorney, did the "pitting against." Thus the Prosecutor objected to the State witness' response – and it was SUSTAINED. It continued as follows:

19 BY MR. CROSBY:
20 Q. Would you agree that, in preparing your
21 statement to help the state's case, that it would be
22 important for you and detrimental to the defense, if you
23 are talking about steps as opposed to coming after. A
24 step is different, regardless of who took a step, but if
25 you put in your report that he is taking a step as
26 opposed to coming after him, would you agree that that
27 hurts the defense?
28 MR. WARD: Objection, Your Honor.
29 THE COURT: It's sustained as to the form.
(T 280; RE 165)

The above occurred during Inv. Brown's testimony; whereas, the following happened during the Crime Scene Investigator, Britt's testimony.

H (d) (2) BOTH PROSECUTOR AND JUDGE'S COMBINED MISCONDUCT AND BIAS CONCERNING

--INV. BRITT'S TESTIMONY (related to Issue III. d. 2.)

When Defense counsel attempted to question a witness, as set forth above, the Prosecutor peppered the trial with objections. Then, despite an identical question to Inv. Brown, clearly establishing that GSR opinions were not admissible, the Prosecutor asked Inv. Britt the same objectionable question. Further, sometimes when the Defense objected, the Prosecutor continue

to establish facts by proceeding to ask questions without waiting for a ruling, as the following example shows:

--First, the question, objection, and sustaining of objection to Inv. Brown's answer:

12 Q. All right, sir. One additional thing, during
13 the course of your investigation, you had prepared
14 gunshot residue kits on all that were present, correct?
15 A. Yes, sir.
16 Q. And has the Biloxi Police Department received
17 those results?
18 A. Yes, sir.
19 Q. And the results from the gunshot residue on the
20 defendant came back negative, correct?
21 A. Yes, sir.
22 Q. And the gunshot residue on the defendant's wife
23 came back positive, correct?
24 A. Yes, sir.
25 Q. **Does that indicate that she fired the gun?**
26 A. No, sir.
27 MR. PAYNE: Your Honor, we would object to
28 any testimony on -- he has not been established
29 as an expert. There's been no foundation laid
29 as an expert. There's been no foundation laid
1 for him to be able to speak to the report. If
2 they want to get somebody to talk about the
3 crime report, they need to get the crime lab in
4 so that we could have an opportunity to
5 cross-examine them.
6 THE COURT: **The objection is sustained.**
(T 268-269; RE 153-154)

Despite the above GSR question being prohibited, the Prosecutor disregarded the Judge's ruling, and again, put it within the hearing of the jury as follows:

27 Q. Without going into any expertise, counsel
28 opposite went in great depth to your training and your
29 experience. Has it been in your training and experience,
1 in relation to gunshot residue kit results, that some are
2 **positive for shooters and some are negative for shooters**?
3 MR. CROSBY: I'm going to **objec**t unless we
4 are talking about, A, this case. And B, when I
5 asked him to try to make him an expert to
6 testify for me he couldn't do it. And now all
7 of a sudden he is an expert for the prosecutor.
8 So we object.

9 THE COURT: The objection is **sustained**.
10 But I'm also cautioning you as to a speaking
11 objection.
12 MR. CROSBY: Yes, sir.
13 THE COURT: The objection is **sustained**.
14 BY MR. WARD:
15 Q. Let me ask you this, **the mere fact it was a**
16 positive gunshot residue --
17 MR. CROSBY: **Same objection. Same**
18 objection. Same objection.
19 BY MR. WARD:
20 Q. **-- a positive gunshot residue result, would that**
21 end your investigation?
22 A. No, sir.
(T 308-309; RE 193-194) - The Prosecutor asked it again anyway.

Having clearly established in Inv. Brown's testimony that opinions regarding the GSR were not admissible, (above) by the Prosecutor's very own objecting to the above, reflects Prosecutor's complete disregard for rules, and nothing applied to him[15].

The "fact" that GSR was on Mrs. Richardson's hands and not on Mr. Richards hands was ruled admissible by the Trial Judge; however, the judge did not allow the witnesses to express opinions regarding the same. Nevertheless, the GSR indicated that Mr. Richardson, supposedly the shooter, had absolutely no GSR on his hands, whereas Mrs. Richardson had GSR on both hands and on the back of one. Since the jury could look and see that Mrs. Richardson was small, and since the prosecutor himself, via Investigator Brown (T 267-269; RE 152-154) established the presence and absence of the GSR on the husband and wife's hands, the facts were in evidence. The Defense attorney simply requested the Investigator to state what was probably obvious, it would be more likely a small woman would use two hands to hold a gun – but the prosecutor objected and the Trial Judge sustained the objection. While the response should have been obvious, the Defense does have a right to ask relevant questions, and since the GSR was on

[15] In Closing Argument, as set for herein below, the Prosecutor quoted the objected to responses concerning GSR, of both Investigators, despite the fact that the Judge actually sustained the objections in both instances.

both her hands, the question was directly relevant, but the relevant testimony was barred as follows:

18 Q. All right. Now, would you agree that you've
19 already testified that this is probably one of the
20 biggest handguns available to the public, you agree with
21 that?
22 A. Yes.
23 Q. Now, if a small woman, let's say, a woman of
24 small stature was going to hold a gun, would it be more
25 or less likely that she would require two hands or one
26 hand to hold a gun up?
27 MS. McFADYEN: Objection, Your Honor. That
28 calls for speculation. It's assuming facts that
29 aren't in evidence.
1 THE COURT: Sustained.
(T 377-378)

The improper objections continued as follows:

21 A. I do conduct examination of clothing at times to
22 see the proximity of a firearm to the clothing.
23 Q. And when you do that, what are you looking for?
24 A. Usually, gunshot powder. Sometimes the unburned
25 powder will exit the firearm, or depending on the
26 proximity of the barrel, sometimes you will have burn
27 marks coming out of the barrel from the particles that
28 are still super heated.
29 Q. Now, would you agree that the closer the gun is,
1 the more the residue?
2 MS. McFADYEN: Objection, Your Honor.
3 Speculation.
4 MR. CROSBY: He just testified that he is
5 looking to the clothes to see -- in order to
6 determine how close the gun is, he is looking to
7 see what residue is there. I'm asking him to
8 follow up to explain why he would say that, what
9 he means by that.
10 MS. McFADYEN: It goes to expert results.
11 THE COURT: Sir, what's your title?
12 THE WITNESS: Crime scene investigator.
13 THE COURT: The objection is overruled. I
14 will allow him to answer that question if he
15 can.
(T 379-380; RE 222-223)

Thus, at first, the Trial Judge correctly allowed the Defense to develop the testimony

regarding stippling on the victim's clothing. But, just as the Defense began to make progress, the Prosecutor with the Judge's rulings, again hampered the quest for truth, as follows:

16 THE WITNESS: Yes. Proximity to the barrel
17 could have a relation to items that were
18 deposited on the clothing.
19 BY MR. CROSBY:
20 Q. So the closer the gun, the more the items
21 deposited, correct?
22 A. Yes.
23 Q. By items deposited, you mean like burned and
24 unburned residue that comes flying out of the barrel of
25 the gun and embeds itself into the person, wherever the
26 bullet goes, right?
27 A. Well, it could be the person, the clothing,
28 whatever is in front of that end of the barrel.
29 Q. So, for the most part, what you are looking for
1 is the -- it's not just the bullet, but all the stuff
2 that comes out when it comes flying out the barrel,
3 right? It flies out the barrel and embeds itself into
4 whatever it hits, right?
5 A. Yes, sir.
6 Q. In this case, you have a lead projectile, right;
7 is that correct?
8 A. Correct.
9 Q. You have a metal jacket that goes around the
10 lead projectile, right?
11 A. Correct.
12 Q. And in that shell flies also out with all this
13 gunpowder, goes flying more or less in that same
14 direction, right?
15 A. More or less, yes, sir.
16 Q. Also, it sort of comes out, it starts out small
17 and it gets bigger and bigger and bigger as it goes out,
18 right?
19 A. Yes.
20 Q. But it only goes so far, right?
21 A. Correct.
22 Q. The bullet can hit the other side of the room,
23 but the stippling is not going to hit the other side of
24 the room, right?
25 A. Correct.
26 MS. McFADYEN: Objection, Your Honor.
27 Again, he is not a firearms expert. He hasn't
28 been tendered as one and we're getting further
29 and further into expert questions.

1 MR. CROSBY: I'm only basing this on his
2 knowledge. And these are facts that are very
3 important and brought up by the state that the
4 state has already talked about distance. And we
5 have an autopsy report and these other matters
6 we are about to get into.
7 THE COURT: What firsthand knowledge does
8 this witness have with regard to the gunshot
9 residue test that was taken in the instant case?
10 MR. CROSBY: We are not talking
11 specifically about the test. We are talking
12 about the evidence. And in this case, we have a
13 person who has stippling evidence on his body
14 that we're about to talk about. I'm trying
15 to --
16 THE COURT: This witness either procured
17 that or has knowledge about the results?
(T 380-382; RE 223-225)

The judge was again falling back on the misperception that, unless this witness actually procured the stippling in this case, that his ability to explain how it was supposed to be done, based upon the fact that he is the one who is supposed to do it (i.e. the crime scent investigator), was not relevant or admissible. Defense Attorney tried a different approach as follows:

18 MR. CROSBY: Yes, sir. Let me say it like
19 this.
20 BY MR. CROSBY:
21 Q. Were you present during the autopsy?
22 A. Yes, I was.
23 Q. And during that autopsy, isn't it true that the
24 doctor took note of stippling on the man's body in the
25 area of the gunshot entry, bullet entrance?
26 MS. McFADYEN: Objection, Your Honor. The
27 expert would testify as to that, not the
28 collector of the evidence, or the crime scene
29 tech.
1 THE COURT: Sustained.
(T 382-383; RE 225-256)

The purpose of attending the autopsy, was for the crime investigator to get the evidence from the Doctor, and he had to have a basic understanding about what he was collection in order to perform his job – but the judge could not understand this, at first.

2 BY MR. CROSBY:
3 Q. Is it your testimony that you don't know whether
4 or not stippling was found on the body?
5 MS. McFADYEN: Objection, Your Honor. He
6 is not in a position to answer that question.
7 The expert witness would do that.
8 MR. CROSBY: His position was standing
9 right next to the body when it happened. His
10 duty is to collect evidence. And evidence in
11 this case and a gunshot case always involves
12 stippling.
13 THE COURT: The objection is overruled.

Now, the judge began to comprehend.

14 You may answer that question.
15 THE WITNESS: I'm sorry, could you ask the
16 question again.
17 BY MR. CROSBY:
18 Q. Is it your testimony, that the man -- that the
19 deceased in this case had or did not have stippling on
20 his body in the vicinity of the entrance of the gunshot
21 wound?
22 THE COURT: Hold on one second. The
23 objection is sustained as to the form of that
24 question. Ask him about his personal knowledge.
(T 383; RE 226)

Now the Trial Judge was getting confused with the need to have personal knowledge, as opposed to having general knowledge that could be used to educate the jury so that they could understand what was and was not done, and what should have been done, but wasn't, based upon the crime scene investigator's duties and observations.

25 BY MR. CROSBY:
26 Q. Were you standing next to the deceased when his
27 body was autopsied?
28 A. I was in the room, yes, sir.
29 Q. You were in the room to collect evidence, were
1 you not?
2 A. To photograph.
3 Q. And to collect evidence, yes or no? Did you
4 collect the bullet?
5 A. Yes, I collected it from the coroner.
6 Q. Did you collect his clothing, yes or no? I
7 mean, was there any clothing to collect at the autopsy?

A. No, there was none.
Q. Did you collect -- you said you photographed?
A. Yes, I did.
Q. When you photographed this body, did you not see stippling and burn areas in the vicinity of the bullet hole above his navel, did you not see that when you took the pictures?
A. I do not recall that. I would have to refer to my pictures.
Q. Okay. Do you have your pictures with you?
A. No, not with me. They have the disc.
MR. CROSBY: Do y'all have the original disc with the pictures? Your Honor, I'm going to try to get from the state the original file so he can refer to it. May I approach, Your Honor?
THE COURT: You may.
BY MR. CROSBY:
Q. I'm going to hand you what's not marked or not published to the jury as pictures. And ask you, again, are these the pictures that you took while the doctor was performing the autopsy? And what I'm going to ask you, when you look at those pictures, if you would look to the wound extending one half inch below the umbilicus to the lower anterior chest, eight and a quarter inches longitudinally across the upper abdomen and lower chest, five and a half inches traversely, if you can tell us whether or not in that area if there is stippling on the body?
A. To answer your question, yes, these are the pictures that I took.
Q. Okay.
A. Based upon these photographs, I can't tell.
Q. You can't tell one way or the other?
A. No.
Q. All right. Will we have to ask the doctor to make that determination?
MS. McFADYEN: Is that a question?
BY MR. CROSBY:
Q. I'm asking him would we have to defer to the doctor to make the determination about the stippling found on the body?
MS. McFADYEN: We would object to that. It would call for speculation on the part of this witness.
THE COURT: Sustained.
(T 383-385)

At this point, the Investigator has become evasive, by taking a clue from the Prosecutor.

25 BY MR. CROSBY:
26 Q. Did you see the angle of the bullet, the path of
27 the bullet?
28 A. **I saw the rod that the pathologist used to show**
29 the angle, yes.
(T 385)

1 Q. It's a rod that the doctor or pathologist takes
2 and he puts in the hole where the bullet enters --
3 MS. McFADYEN: Your Honor, I object. It's
4 not proper for this witness to go into this
5 information.
6 THE COURT: I don't see it either. I will
7 let you get to your question, and then you may
8 renew your objection.
9 BY MR. CROSBY:
10 Q. You just talked about a rod that the pathologist
11 put into the pullet hole, right?
12 THE COURT: No, he hasn't stated anything
13 about a rod.
(T 386)

The judge is chastising the Defense Attorney, again, in front of the jury. The judge's statement and observation is incorrect, as can be seen by looking at the underlined and bold words a few sentences above. (T. 385 line 28-29 he said a "rod")

14 BY MR. CROSBY:
15 Q. Did you just say something about the path of the
16 bullet, something the pathologist put into the hole?
17 THE COURT: Go ahead.
18 THE WITNESS: I have a photograph of a rod
19 that was placed into the entrance wound.
20 BY MR. CROSBY:
21 Q. To your knowledge, why was that put in there and
22 why did you photograph it?
23 A. Typically, to show the trajectory of the
24 projectile.
25 Q. Okay. So now, based on your job, to document
26 the trajectory of the bullet, could you tell the ladies
27 and gentlemen of the jury what the trajectory was?

Note: On page 385, lines 25 to 29, of the transcript, he already admitted he could answer this question.

28 MS. McFADYEN: Again, Your Honor, that
29 calls for an expert opinion as to properly
(T 386)

1 answer his question. He is not qualified to do
2 it.
3 MR. CROSBY: I could qualify it like this.
4 BY MR. CROSBY:
5 Q. As part of your job as a crime tech, you are
6 supposed to document what you are looking at, right?
7 A. I photographed the autopsy.
8 Q. And part of your photographing of the autopsy
9 was photographing the trajectory of the bullet, right?
10 Did you do that?
11 A. Yes, the rod that the pathologist had in the
12 entrance wound.
13 Q. What was the angle of the rod that the
14 pathologist put into the body, what was the direction it
15 went in?
16 A. I do not know.
17 MR. CROSBY: Ask the court's indulgence. I
18 tender the witness.
19 THE COURT: Any redirect?
20 MS. McFADYEN: No, Your Honor.
(T 387)

With incessant objections, and the flip flopping of the Trial Judge's rulings, the witness apparently decided that he could not answer the question, despite the fact that it was his job to photograph and establish the very things he was asked about i.e. trajectory and angle. Every single little detail out of this witnesses' mouth was fought and battled for. This makes it most difficult for a jury to keep up with what is being said, and denies the Defendant, his right to a fair trial – especially when the Trial Judge contradicts the Defense Lawyer in front of the jury, claiming that the attorney is wrong, despite the fact that the Defense Attorney was absolutely and positively right. The truth is clearly being attacked by the State of Mississippi.

21 THE COURT: Sir, you may step down. Please
22 don't discuss your testimony with anyone until
23 this case is concluded.
24 MS. McFADYEN: We ask that the witness be
25 excused.
(T 387)

With respect to Prosecutorial Misconduct, regarding its attempt to have the physical statement of Mrs. Richardson's statement admitted, the Trial Judge chastise the Defense in front of the jury for a "speaking objection'" even though the judge did grant the Defense objection, however, when the Prosecutor clearly demonstrated a speaking objection to clearly objectionable material, the Trial Judge said nothing – not one single time did the Trial Judge chastise the Prosecutor for their speaking objections and commentary in front of the jury. Note, this is set forth below to avoid repetition, and despite the Trial Judge denial of the admission of the statement, the Prosecutor inflicted the damage by flaunting the statement, and reading directly from it, over the Defense objection, in Closing Argument (see below).

H (d) (3) BOTH PROSECUTOR AND JUDGE'S COMBINED MISCONDUCT AND BIAS CONCERNING:

-- PROSECUTOR'S MISCONDUCT IN STATING EVIDENCE WHICH WAS NOT IN EVIDENCE AND FALSE DURING CLOSING ARGUMENTS (related to Issue III. d. 3.)

During the trial[16], the Prosecutor got the benefit of most everything he requested, and continuously objected and disrupted the Defense. However, there were a few things that did not go his way.

First, the Trial Judge did not allow the Prosecutor to let the Investigators, Brown and Britt, answer his questions concerning whether the fact that Mr. Richardson had no GSR on his hands, but Mrs. Richardson had it all over her hands meant that MR. Richardson did not fire the weapon. The Defense objected, and the Trial Judge sustained the objection because it was expert

[16] In addition to all other improperly sustained objections, during the Voir Dire portion of the trial, Defense counsel attempted to ask the jury about any potential conflicts due to any prior issues with the brother of Defense Counsel, Tom Payne, whose brother was the Sheriff of Harrison County for many years (note, the Defendant's middle name is "Payne,") and further, attempted to ask about his 27 years in the Air Force and any potential conflict, but in both instances, Defense was unjustly restricted in exploring the potential areas of detriment, and a Motion for a Mistrial was made and denied on these points. (T 179-181; 195-197; RE XXX)

opinion, and not properly before the court. Note, the Prosecutor vehemently objected when the Defense tried to do the same thing, but obviously disregarded the rules when it did not suit his purposes. In Closing, the Prosecutor falsely stated to the jury that "two detectives stated that the GSR evidence did not mean that Mr. Richardson did not fire the weapon," in direct violation of the Trial Judge's ruling.

The improper GSR comments, made in defiance of the Court sustaining of the Defense's objections is as follows:

17 You don't have
18 gunshot residue results in evidence. And you
19 certainly don't have anyone saying that if there
20 is gunshot residue on someone's hands they even
21 fired the gun. **You have two state's witnesses**
22 saying it's just a test to see if they were
23 around the weapon one way or the other, which
24 she admits she was two feet away.
(T 475; RE 231)

The objection to the improper expert testimony took place earlier in the trial as follows:

22 Q. And the gunshot residue on the defendant's wife
23 came back positive, correct?
24 A. Yes, sir.
25 Q**. Does that indicate that she fired the gun?**
26 A. No, sir.
27 MR. PAYNE: Your Honor, **we would object** to
28 any testimony on -- he has not been established
29 as an expert. There's been no foundation laid
1 for him to be able to speak to the report. If
2 they want to get somebody to talk about the
3 crime report, they need to get the crime lab in
4 so that we could have an opportunity to
5 cross-examine them.
6 THE COURT: **The objection is sustained**.
(T 268-269; RE 153-154)

Additionally, with respect to Inv. Britt, the GSR was likewise limited as follows:

18 Q. Could you tell the ladies and gentlemen of the
19 jury just briefly what is involved, based on your
20 education, training, and experience, in the collection of
21 gunshot residue in order to preserve it for further

22 examination?
23 A. The actual kit includes -- it's basically
24 adhesive pads attached to a little handle. And what you
25 do is you actually collect -- you press the adhesion down
26 on the different portions of the hands to collect a
27 sample. One is for the outer hand, one is for the inner
28 hand. Once it's been collected, it's capped and put in
29 an envelope and sealed.
1 Q. The idea is to find out if someone's hand has
2 been involved in a shooting?
3 A. I wouldn't say involved. In the area. It
4 actually tests for barium, antimony and lead, which are
5 the compounds in gunpowder. It just tests for the
6 presence of it. It doesn't tell you if someone shot
7 someone or didn't shoot someone. It just says, yes,
8 these elements are on this piece of adhesive.
9 Q. So if it's positive, then it would be an
10 indication of the presence of -- that person was in the
11 presence of a gun that exploded, right?
12 A. In the vicinity.
13 Q**. In the vicinity. And if it's negative, that**
14 would tend to indicate someone was not in the vicinity,
15 right?
16 MS. McFADYEN: Objection, Your Honor. I
17 believe he is getting into more expert
18 testimony. This witness is not an expert.
19 Hasn't been identified an expert.
20 MR. CROSBY: I will base any question I've
21 got just on his own education, training, and
22 experience, and he already testified that this
23 is so simple that it requires no expertise. You
24 simply follow the instructions on the box.
25 MS. McFADYEN: Now he is getting into
26 results.
27 THE COURT: **The objection is sustained.**
(T 375-376; RE 221)

So, to the extent that the Prosecutor did not get his way, he circumvented the ruling of the court, intentionally, in closing argument – directly defying the court's rulings.

Secondly, during the trial, one of the reasons that Mr. Richardson allowed Quilon to temporally reside in his home, was because his own children kicked him out of their homes – thus, making him homeless. This was one of the few beneficial points that made its way into the trial, and it was one that reflected poorly upon Quilon, and favorably upon Mr. Richardson

because he was willing to do what his family would not. The Prosecutor apparently was not satisfied with this fact, and thus, in the Closing Argument, he claimed, falsely, that Quilon's family had been in court all week, concerned about the trial, hoping for "Justice." The Defense objection to this because not only was it an expression of facts not in evidence (directly contradicting the Defense theory that Quilon's family abandoned him), but also, it was a plea for a verdict based upon sympathy, rather than the facts. Although the judge attempted to stop him, the Prosecutor said it again anyway, to which it was again objected to, but the Trial Judge let it happen.

2 Ladies and gentlemen, as I mentioned,
3 counsel opposite has made several arguments,
4 including that the defendant was very sorry.
5 The victim is obviously dead and gone. His
6 family is here, been here all week. I can
7 assure you that they're very sorry. But this
8 isn't --
9 MR. CROSBY: Objection, Your Honor. That's
10 improper. That's facts not in evidence. You
11 can't talk about whether -- he is testifying
12 whether someone in the audience, someone's
13 family, that's improper. And now he is talking
14 about sorry and that's beyond the defendant.
15 That's objectionable.
16 THE COURT: Each of the parties don't
17 interject yourself. You may proceed, sir.
(T 476; RE 232)

The Court appeared to have granted the objection, but that did not stop the Prosecutor, and he drove the improper point, (facts not in evidence, and in direct contradiction to the Defense's contention that the family abandoned Quilon) as follows:

18 MR. WARD: Yes, sir. The family is very
19 sorry about this. But this is not a game,
20 ladies and gentlemen. And this is not how muddy
21 we can get the water with absolutely ridiculous
22 arguments that are not supported by facts. This
23 is a duty that you have. And I completely agree
24 with counsel opposite, this is a great country.

25 But as a juror, you are charged with the
26 responsibility of following the law in this
27 case. And I would submit to you, if you would
28 listen to the defendant's statement, and if you
29 would listen to what the defendant's wife
1 ultimately had to admit that she had said on the
2 night in question, that you will have to find
3 the defendant guilty.
(T 476-477; RE 232-233)

Finally, he was not allowed to admit the physical statement of Mrs. Richardson into evidence, even though the established that one existed, and that despite her continuous protests concerning that the damaging portions of her statement to Inv. Brown was only because he was confused, the Prosecutor established, through his in court statements and questions, that he disagreed with her. He circumvented the Trial Judge's denial of allowing him to admit the physical transcript into evidence by reading from it in front of the jury in the Closing Argument. The defense objected to him doing this, but the Trial Judge allowed him to do so anyway.

21 What we have her saying is, is that this
22 man came into their bedroom, got a gun that was
23 loaded and said, and I'll quote her --
24 MR. PAYNE: Your Honor, we're going to
25 object if he is going to read from a transcript
26 or anything like that. That's not in evidence.
27 She testified to it. He has to rely on the
28 jury's memory. Objection, he can't do that.
29 THE COURT: The jury will recall, and if
1 counselor needs to refresh his recollection from
2 his notes he may.
3 MR. WARD: That Rudy just liked to tease my
4 husband. I told him not to tease him, you know,
5 he can't take a joke.
6 MR. PAYNE: Your Honor, we would ask if
7 that is his notes or is that a transcript he is
8 reading from?
9 THE COURT: The objection is overruled.
10 MR. PAYNE: Thank you, Your Honor.
11 MR. WARD: He came in and said, he said he
12 wants to sleep with you. That's offensive.
13 That's offensive. It should be offensive to
14 every one of you on the jury. But it's not he
15 says he is going to rape you. It is not that

16 I'm going to kill and harm the family. It's he
17 says he wants to have sex with you. (T 477-478; RE 232-233)

During the trial, the Prosecutor waived the statement in the air, and tried repeatedly to have it admitted, and although that was one of the few minor victories of the Defense in keeping the physical statement out of evidence, it was to no avail as the Prosecutor circumvented this. The portion of the transcript in which the Prosecutor argued for the statement's admission in front of the jury was as follows:

27 MR. WARD: One second, Your Honor. Your
28 Honor, at this time I would like to re-offer the
29 tape. It's extrinsic evidence to support the
1 state's position.
2 THE COURT: The legal objection?
3 MR. PAYNE: Yes, Your Honor. We would
4 certainly object. He's had an opportunity to
5 cross-examine this witness in front of this
6 jury. Now, to go back and try to bolster his
7 side of the case with a tape that may or may not
8 have been coerced or problematic, that is wrong.
9 We've got the witness right here. She has
10 testified. That's enough. And we would object
11 to anything else.
12 THE COURT: Based on bolstering, the
13 objection is sustained.
14 MR. WARD: If I may, I would just ask out
15 of Harrison versus Kitt, a case when a witness
16 denies or cannot recall, recollect a prior
17 statement, intrinsic evidence of the statement
18 is admissible under that particular 1988
19 Mississippi Supreme Court case.
20 THE COURT: Let's take the jury out.
(T 349-350; RE 219-220)

The Defense had few beneficial rulings, but to the extent that he did, the Prosecutor brazenly negated everything, ignoring and right of due process and submitted anything and everything he wished, violating the power and dignity and authority vested in him by virtue of being and officer of the State of Mississippi.

The prosecutor there upon attempted to have the transcript and or recorded statement

admitted. The Trial Judge did not allow it, but he did allow him to treat her as a hostile witness and ask leading questions. Further, the Defense Moved for the Trial Judge to make a finding that the State opened the door in that she did make reference to his having been in prison and pornography. {… and he's been to the prison, you know . . . (T 317; RE 202); and then later she testified, . . . [t]his is - - because of this words [sic], it's because of the computer, you know, pornography." (T 330; RE 215). The Trial Judge denied the request to find that the door had been opened and stated that the responses were not responsive to the Prosecutor's questions. Thus, the jury heard vague references to pornography and prison experience, and there is no way to determine what prejudice it had on the case. Conceivably, they could believe that Mr. Richardson approved of the pornography (as opposed to Mrs. Richardson) and with respect to the prison stay, the jury may have thought that the Richardson's were aware of the bad record and thus, had no reason to have fear instilled. The trial was a convoluted mess beyond repair at this point. (T 331-337; RE 216-219)

Note: He continued to make his argument for the statement, circumventing any and all justifiable reasons for keeping it away from the jury. The impact of his speaking out and arguing before the Trial Judge was detrimental to the Defense, especially as the Trial Judge allowed him to speak to him in such fashion, but when the Defense Attorney did anything that the judge did not approve, the Trial Judge was quick to chastise as outlined hereinabove. Although, he did finally send the jury out; however, regardless of whether the statement was admitted into evidence or not, the unfair prejudice was inflicted upon the proceedings.

H (d) (4) BOTH PROSECUTOR AND JUDGE'S COMBINED MISCONDUCT AND BIAS CONCERNING:

--THE JUDGE'S DENIAL OF THE OBJECTIONS TO AND MOTIONS FOR A MISTRIAL TO ALL THE MISCONDUCT AND BIAS. (related to Issue III. d. 4.)

With respect to the Voir Dire, the objection to the Trial Judge's refusal to allow the Voir Dire as described above, was made on the record at (T 195-197; RE 96-98), ending with the Judge ruling against the Mistrial.

With respect to the Motion for a continuance to secure proper hearing aid equipment for Mr. Richardson, and the Motion for a Mistrial when the audio equipment (large ear phones) failed to solve Mr. Richardson's ability to hear the evidence and communicate with his counsel, the Motion was discuss and denied on (T 213-220; RE 112-119)

The next Mistrial Motion was made during the Opening Statement, was made and denied on (T 240-242; RE 135-137). This Motion concerned the refusal of the Trial Judge to allow Mr. Richardson to outline what he expected the evidence to show with respect to the information he gave the reporting officer who arrived on the scene while he was still on the telephone with the 911-dispatch lady. For the reasons set forth above, the Trial Judge refused to allow him to present an outline of what he expected the evidence to show, as the Trial Judge stated "that the Key word was 'evidence,'" asking "is Opening Statement where you present 'evidence' to the jury?" (T 240; RE 135) At which time the Defense advised, no, but if the Opening Statement allows the party to set forth what he expects the evidence to be, then he should be allowed to do so. When the Judge rejected the argument, the Attorney asked to "proffer" the desired statement, and again, the Trial Judge refused the request, and told him to have a seat. Further, when the Prosecutor objected to the argumentative ness of the Defense's Opening Statement, the Defense

requested that he be given the same opportunity that the State had in that the Prosecutor "argued" every sentence, but the court chastised the Defense attorney in front of the jury and asked if a contemporaneous objection was made, and that it was his duty to do so, and when the Defense attorney advised that he didn't wish to object, but simply to be allowed the same opportunity to do as the Prosecutor did, the Trial Judge overruled the mistrial motion, and continued to chastise and make the trial difficult for the Defendant. (T 240-242; RE 135-137)

The next Mistrial Motion was made after Inv. Brown's testimony, and renewed the Motion made in the Opening Statement's Mistrial Motion with respect to where the Trial Judge told the Attorney to sit down when a proffer was requested, and Defense attorney revisited the issues concerning Mr. Richardson's statement to the Police officer, as a continuation of his statement to the 911-dispatch lady. Defense argued again that just because, as the Trial Judge asked, if he could prove his case with testimony, even if an Opening Statement was denied, the issue was whether he had a right to an opening statement or not, and if he did, then he should be entitled to set forth a reasonable summary of what he expected the evidence to be – a clear, concise, coherent opening statement, which was denied by the judge. Further, Defense counsel stated that he was being chastised in front of the jury, or in front of an audience, which quashed the spirit of Defense Attorney which was a denial of the Defendant's right to a fair trial, as it takes a toll on the Attorney. Attorney advised the judge that his actions, such as stopping the proceedings and asking the witness to repeat that the Defendant appeared to be drinking, and the judge stopped the proceedings and had the witness repeat the answer, causing the jury to focus on the "smelling of alcohol," creating undue and unfair prejudice. The Judge's response was "Your Motion is denied. See y'all after lunch. Have a good lunch. (Recess) (T 311-315; RE 196-200)

The next Motions for Mistrials was made in and after closing argument, which was outlined in this brief above; however, the improper closing argument was objected to as it happened, (T 476-479; RE 232-235), and then again, after the end of closing argument (T 481-487; RE 237-242)

I. <u>The following factual statement addresses issue "IV"</u> : SHOULD THE TRIAL JUDGE HAVE ALLOWED POST TRAUMATIC STRESS DISORDER (PTSD) TO HAVE BEEN USED AS A DEFENSE BY MR. RICHARDSON (related to Issue IV)

PTSD is a defense in an ever increasing number of jurisdictions, and it is used as a defense to crimes of violence when the Defendant asserts that his diagnosis of PTSD caused him to perceive and react to threats to his safety in a more defensive and/or aggressive fashion that one without the diagnosis, and thus, his actions should be excused – legally. At the time of the trial, Mississippi had not recognized this as a valid defense. Because Mr. Richardson had been diagnosed and treated for PTSD for years due to his military experience; he would have qualified for the defense but for the fact that Mississippi had not yet allowed its use.

Before, during and after the trial, Mr. Richardson asserted on the record, and while acknowledging that he could not expect the Trial Judge to allow it as a defense, that it was anticipated that someday Mississippi's Supreme Court would allow its use, and he wanted to make sure that the record sufficiently reflected that he should receive the benefit of any change in the law – perhaps the law would change for him. (T 48, 124, 202, 521; RE 46, 91, 101, 243)

In the post-trial motions, the Trial Judge acknowledged that the issue had been preserved for appeal (T 521; RE 243), and thus, Mr. Richardson is hereby requesting that the Court find that he should have been entitled to this defense and either reverse the verdict for this reason, and in the alternative, grant him the right to use this defense when the case is sent back for retrial.

<u>SUMMARY OF THE ARGUMENT</u>

First, Mr. Richardson had to shoot Quilon, a homeless man recently released from prison,

who, at the request of his church elders, he allowed to temporally stay in his home with his family. The stay was supposed to be for a few weeks, but it turned into a five-month nightmare. To dissuade and deter the Richardson's from insisting that he vacate immediately, he revealed the violent record for which he served time in prison, (i.e. murder and robbery) and began to portray himself as a dangerous man, bragging about his convictions and details of the things he did while serving time in prison (i.e. killing people). The Richardson's were misinformed that Quilon had wanted to change his ways, and wanted to lead a Christian life, but only needed a little help; instead, he bragged about his criminal activity, to the horror of the Richardson's.

On the fatal night, Quilon had become so brazen that he advised Mr. Richardson that he wanted to have sex with his wife. This was the last straw, and Mr. Richardson decided that he would have to make him vacate the residence, but armed himself before he approached Quilon, for protection, because of the fear instilled through Quilon's bragging about his prior record and related conduct. Armed, Mr. Richardson told Quilon to leave, but in defiantly, he approached Mr. Richardson in a threatening fashion, causing Mr. Richardson to fire a warning shot, and finally a shot into Quilon's stomach, resulting in his death. Mr. Richardson acted in self-defense, and at trial, asserted that Quilon's bragging caused him to fear (state of mind) Quilon, necessitating his having to arm himself; however, the Trial Judge barred any mention of the prior record and related conduct, despite the state of mind exception to the hearsay rule. The Judge erroneously excluded this evidence claiming that it was inadmissible character evidence, barred by the 10 year rule, and unfairly prejudicial; however the Defense argued that the prior record and related evil conduct in prison was asserted by Quilon over the five months he lived with them, including the very night of the shooting, and that without being able to explain this to the jury, the jury would not understand why Mr. Richardson believed that he needed to arm himself.

It was intended to show Mr. Richardson's state of mind, and it was not intended for the truth of the matter asserted.

Secondly, during the opening statement, the judge allowed the Prosecutor to describe the first half of Mr. Richardson's statement made to the 911-dipatch operator, but refused to allow the Defense to describe the second half of the statement, given to the reporting officer who took the phone out of his hand, disconnected the phone, and continued taking the statement. The second half of the statement had the most important additional information describing the reason he was afraid of Quilon and why he had to shoot in self-defense. Because the first half favored the Prosecutor, the Trial Judge allowed the Prosecutor to outline it to the jury; however, when the defense attempted to outline the rest of the statement, the Prosecutor objected and the Trial Judge sustained the objection. The Defendant argued that allowing the Prosecutor to describe the first part of his statement to the police, and pretending that his statement terminated when the 911 lady disconnected the phone was unfair and misleading. The prosecutor argued that what a defendant says to the police at the time of an incident carries more weight than what a defendant says, at a later time, after retaining counsel. The defense agreed, and stated that was exactly why it was important to tell the jury the remainder of the statement, since the State chose to outline the beginning of the statement made to 911, then in all fairness, the Defendant should have been able to describe the second half of the statement, which contained the most important part of the defense.

Throughout the trial, as the transcript reveals, the Judge and Prosecutor demonstrated predisposed bias, which was readily obvious to any and all observers – therefore, the jury was impermissibly influenced. Not allowing the Defendant to repair his hearing aid, and accusing him of faking a hearing problem by describing Mr. Richardson's responses to the prosecutor's questions during a proffer to be evasive and non responsive, as opposed to clearly responding to

his own attorney; however, when read, the transcript disproves 100's the claim.

The Trial Judge required the Defendant to wear ridiculous and large head phones to provide audio assistance, calling that it was a proven and tried instrument; however, the ear covers blasted loud noise into his ears, making him unable to speak softly to his attorneys, and if he removed the headgear as instructed by the judge, to communicate with his attorneys, then he could not hear what was being said in court. The judge, throughout the trial, chastised the defendant regarding his attempts to communicate with his attorneys, and directed the attorney's to teach him hand signals – in the middle of a murder trial.

The prosecutor asked questions he knew were inadmissible, based upon the judge's rulings, the prosecutor talked through objections, to prejudice the jury without waiting for a ruling, and in closing argument, the prosecutor referenced several major issues which had either been excluded by the judge or not ever admitted into evidence. Because the Trial Judge expressed contempt for the Defendant and the Defense attorneys, and allowed the Prosecutor to do whatever he wished, the Defendant did not receive a fair trial.

Finally, the Defense proffered on the record Mr. Richardson's history of PTSD and argued that some time in the future, that Mississippi's Supreme Court might allow a defense based upon a Defendant's medical condition with respect to his perception of reasonable self-defense. Upon retrial of this case, Mr. Richardson asks the Supreme Court to direct the lower court to consider the medical evidence and if sufficient, allow a defense in consideration of his PTSD.

ARGUMENT

Appellant, Mr. Richardson has groped the Issues into four categories, set forth in the "ISSUES" section, and listed herein below. The first issue, regarding the Trial Judge's refusal to allow the evidence concerning the "victim," Quilon's bragging about his prior record and his

murderous behavior while in prison for those convictions, as a means to instill fear in the Richardson's, is respectfully submitted, to be reversible error of such magnitude as established by at least one Supreme Court from the very district of the Trial Judge, that the remaining issues may not require this Court's valuable time and consideration; nevertheless, the Appellant implores this honorable court to address all the issues, inasmuch as this case may have to be retried, and the only hope of preventing such frustrating injustice in the future, is for this Honorable Court's expression of remonstration. The first ISSUE is as follows:

I. THE TRIAL JUDGE ERRED BY GRANTING OF THE PROSECUTOR'S MOTION IN LIMINE TO PREVENT ANY MENTION OF QUILON'S PRIOR CONVICTION AND RELATED CONDUCT, OF WHICH HE BRAGGED TO INTIMIDATE MR. RICHARDSON, IMPACTING HIS STATE OF MIND (THEORY OF SELF DEFENSE)

[The facts related to this Issue as argued are set forth on pages 11 and 12 of this Appellant's Brief and incorporated herein by reference]

When a jury is charged with the duty of weighing the evidence to decide whether a defendant's actions shooting a person, would be justifiable self-defense, this Court has clearly opined that the defendant is allowed to submit evidence, in the trial, that reflects upon his State of Mind, and thereby whether the defendant's actions were justifiable self-defense. As set forth in detail, in the FACTS portion of this Brief, Mr. Richardson armed himself when he decided that he would stand up to Quilon, and demand that he immediately vacate his home, when Quilon advised Mr. Richardson that he desired to have sex with Mr. Richardson's wife. Until that time, Mr. Richardson had endured the obnoxious behavior, and had not given up the possibility that Quilon would leave without confrontation, as he had been willing to do anything possible to encourage a departure, including purchasing Quilon a car and renting him an apartment. Mr. Richardson was afraid of Quilon, and expected a danger to the life of himself and his family, because of the proud bragging of his prior convictions of murder and armed

robbery and the killing of innocents while he served time in prison, any time Mr. Richardson attempted to get him to voluntarily leave. Thus, when Mr. Richardson could no longer accept the presence of Quilon in his home, and because a life threatening violent reaction was anticipated when the request to vacate turned into a demand for immediate departure, Mr. Richardson obtained his gun for protection, approached Quilon, and said you will leave now. As feared, Quilon refused to leave, and attempted to attack Mr. Richardson. When a warning shot fired into the ground did not stop the attack, Mr. Richardson shot the menacingly approaching Quilon in the stomach, and immediately called 911 for the police and an ambulance.

The Trial Judge rejected all pleas to allow the necessary information, on the basis that it was character evidence, that the convictions were over 10 years, and that under rule 403, the convictions and related conduct was too prejudicial. Among the legal argument presented to the Trial Judge, were two Supreme Court cases, one from the Judge current district - a case which the Judge admitted intimate familiarity. Although the Judge rejected the legal argument, which was contained in those two cases, the cases themselves were not handed to the Trial Judge until after Voir Dire, but PRIOR to the Opening Statement and presentation of any evidence. The Trial Judge made a point of saying that the legal authority was not presented until after the Voir Dire, but surprisingly, he admitted that he was intimately familiar with the case law – and it is that case law, which Mr. Richardson respectfully submits, overwhelmingly supports reversal of this case. When provide the physical cases, the Judge stated:

18 THE COURT: And you bring up an interesting
19 point. None of those cases were brought to the
20 court's attention during the arguing of that
21 motion and we have voir dired. However, the
22 court's ruling, based on its understanding, **it's**
23 intimate understanding of the Sanders case, the
24 ruling stands.

If the case was over, and the Defense Counsel had failed to provide the Trial Judge with the proper authority upon which to base a correct ruling of law, then perhaps the Defense Counsel should be faulted, and a conviction of a defendant might be a harsh reality; however, despite the Trial Judge's protest (albeit sarcastically --that he found it interesting that the cases weren't brought to his attention when the issue was first before him), the cases were presented, and the argument renewed for the identical reasons (i.e. state of mind/self-defense) prior to one single piece of evidence and prior to opening statements. Most importantly, the Trial Judge was aware of the case from his district (Hancock County) as he expressed out of his very own mouth that he, in fact, had an "intimate understanding of the Sanders case." Nevertheless, the ruling stood. (T 202; RE 101) Sanders v. State, 77 So. 3d 497, (Miss. Ct. App. 2011), reh'g denied (June 21, 2011), cert. granted, 69 So. 3d 767 (Miss. 2011) and aff'd but criticized, 77 So. 3d 484 (Miss. 2012).

The case of Sanders is perfectly on point, in that Sanders was convicted of murder, and in that case, the trial judge refused to allow the jury to hear any evidence of prior threats, including recent threats, made by the victim to the defendant. Further, that judge refused to allow any testimony regarding sexual assaults witnessed by Sanders on her daughter by the victim. The judge did allow Sanders to explain that the victim had assaulted and choked her on prior occasions, but strangely, refused to allow her to tell the jury that the victim "threatened to make her disappear." Id. at 505-6. Similarly, in the case at bar, Mr. Richardson had been threatened up to and including the night of the shooting, and attempted to submit the threats and threatening boasting of Quilon to show his state of mind/self-defense argument, specifically submitting the Rule 803 exception to the hearsay rule. Although the argument and citation of case law answered perfectly that hit on all four corners of the case, was simply to no avail.

The Court explained the applicable law as follows:

> ¶ 37. When a criminal defendant relies on a theory of self-defense and defense of others, he or she is "of right entitled to offer evidence that [the victim] had previously and recently threatened [the defendant].... This evidence [is] relevant on the issue of [the defendant's] state of mind." *Heidel*, 587 So.2d at 844–45. Sherman's threats to kill Sanders are certainly relevant under Mississippi Rule of Evidence 404(b) in order to show Sherman's intent and plan to kill Sanders. Furthermore, as noted by the Mississippi Supreme Court in *Heidel* and pursuant to Mississippi Rule of Evidence 803(3), Sherman's statements become admissible hearsay ***507** statements as they fall within Rule 803(3), which allows "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)."
>
> ¶ 38. It is apparent from the context of the testimony that Sherman had threatened Sanders's life prior to this occasion and that he was threatening her life during the incident. It is also clear that Sanders knew Sherman possessed a gun that was hidden in their bedroom. Furthermore, Sanders's testimony makes it apparent that upon letting her go, Sherman threatened to kill her and subsequently headed toward the bedroom where he ultimately retrieved his gun and began pointing it at her. The suppression of this evidence prevented the jury from fully understanding Sherman's state of mind and intention to kill Sanders, Sanders's state of mind during the attack, and the grounds for her reasonable apprehension that she and her children were in serious imminent danger. Accordingly, we hold that the trial court's exclusion of this evidence constitutes reversible error.

Sanders v. State, 77 So. 3d 497, 506-07 (Miss. Ct. App. 2011), reh'g denied (June 21, 2011), cert. granted, 69 So. 3d 767 (Miss. 2011) and aff'd but criticized, 77 So. 3d 484 (Miss. 2012)

Likewise, in Newell v. State, 49 So. 3d 66, 71 (Miss. 2010), the Supreme Court approved the Trial Court's allowing the Prosecutor to admit evidence of a threatening phone call (subsequently recanted) that took place hours prior to the defendant killing the victim, after finding that it was relevant Rule 401 for state of mind of defendant, and after the balancing required of fair/unfair prejudice under Rule 403. Though hours removed from the event, the phone threat was nonetheless relevant; similarly, Mr. Richardson testified that the fear inducing threats and boasts of Quilon built up over the five months he remained in their home, up to and including the very night of the shooting. Thus, the Trial Judge's ruling regarding relevance and/or undue prejudicial impact, was a clear abuse of discretion.

To the extent that "character" evidence and the 10 year rule under Rule 609 of the Mississippi Rules of Evidence may have barred the evidence, which was never Mr. Richardson's intended use of the prior convictions or related conduct. The Trial Judge apparently confused the issues. "Character" evidence is an attempt to say that the victim had a conviction, and the conviction itself is relevant because a person with that conviction has a certain character; likewise, the rules do bar convictions that exceed ten years. However, in the case at bar, it was

never the "fact" of the convictions that Mr. Richardson wished to present to the jury, instead, it was the "use" of the convictions by Quilon over the five month stay, up to and including the night of the shooting that Mr. Richardson wished to put into evidence to demonstrate his state of mind of fear, and thus explain the reason he armed himself for protection and reasonably feared a violent threat to his life when he demanded that Quilon vacate immediately.

Interestingly, though the Sanders Brief barely mentioned the issue, the Supreme Court found the errors so egregious and significant to the right of due process, the Court stated as follows:

> While Sanders's counsel only discussed this error in passing in the appellate brief submitted to this Court, we address the issue under the plain-error-doctrine which allows for our analysis of plain errors that were not properly raised by the defendant. M.R.E. 103(d). This Court may review plain error which "seriously affects the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (citations omitted). "Plain-error review is properly utilized for correcting obvious instances of injustice or misapplied law." Smith v. State, 986 So.2d 290, 294 (¶ 10) (Miss.2008) (quoting Newport v. Fact Concerts, 453 U.S. 247, 256, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981)).
>
> Sanders v. State, 77 So. 3d 497, 505 (Miss. Ct. App. 2011), reh'g denied (June 21, 2011), cert. granted, 69 So. 3d 767 (Miss. 2011) and aff'd but criticized, 77 So. 3d 484 (Miss. 2012)

The standard of review regarding admission or exclusion of evidence is "abuse of discretion," and the trial court's decision will not be reversed unless the evidentiary ruling error adversely affects a substantial right of a party." Mingo v. State, 944 So.2d 18, 28 (Miss.2006) (citing Parks v. State, 884 So.2d 738, 742 (Miss.2004)). See also Miss. R. Evid. 103(a). Newell v. State, 49 So. 3d 66, 71 (Miss. 2010). There can be little doubt, the Trial Judge abused his discretion, and in effect, denied Mr. Richardson his right to a fair trial.

It is not often that counsel is able to locate a case so directly on point that they find their way to the Supreme Court, probably because clear case law will be followed, thus preventing the necessity to appeal. Regrettably, the Trial Judge in the case at bar, ignored the law, despite his intimate familiarity with this Court's ruling. It is, therefore, respectfully submitted that with

respect to this ISSUE, the conviction of Murder against Mr. Richardson, should be set aside, and the case remanded for a fair trial upon proper instructions to the Trial Judge.

II. THE TRIAL JUDGE ERRED BY REFUSING TO ALLOW DEFENSE TO ADVISE THE JURY, IN THE OPENING STATEMENT, THAT MR. RICHARDSON CONTINUED TO EXPLAIN WHAT HAPPENED TO THE REPORTING POLICE OFFICER, WHEN THE 911 CALL WAS DISCONNECTED, THEREFORE MAKING IT FALSELY APPEAR THAT HE DID NOT TELL THE POLICE THE REASONS HE WAS IN FEAR, UNTIL MUCH LATER

[The facts related to this Issue as argued are set forth on pages 12 to 16 of this Appellant's Brief and incorporated herein by reference]

Without repeating all the facts related to this issue, suffice it to say, immediately after the shooting, Mr. Richardson had 911 called to request and ambulance and the police. In that conversation, recorded by 911, the dispatch lady asked questions and Mr. Richardson answered her questions and provided information about what happened; however, some of his answers and statements were interrupted by the dispatch lady. When the police arrived, the dispatch lady told him to continue giving his statement to the officer on the scene, at which time said officer took the phone, briefly spoke to the lady, disconnected the call, and continued taking Mr. Richardson's statement. The remainder of the continuous statement contained the more detailed information concerning his state of mind/self-defense argument, but the Prosecutor only referenced the 911 portion of the call in his opening statement. When the Defense Attorney attempted to outline the portion of the statement made to the reporting officer, the Prosecutor objected and the Trial Judge sustained the objection that allowing Mr. Richardson to describe what he told the police officer was improper bolstering[17] of ones statement, to which the Defense

[17] The Prosecutor admitted that a statement given to an officer at the time of the events, carries more weight than a statement given much later, after the Defendant hires an attorney and has time to think about things to say. The Trial Judge not only prevented the Defense from outlining the content of the

agreed, but submitted that since the Prosecution described the first half of his statement, that the Defense should allowed to introduce an outline of the second half, because failure to do so would be misleading and unfair. The Trial Judge scolded the Defense Attorney and asked, if you present the "evidence" to be, and then later decide not to put the Defendant on the witness stand, how can the State cross-examine the Defendant. Counsel advised that opening statements are not "evidence," and either he had the right to present an outline of what he expected the evidence to be or not. After sarcastically advising the Defense Counsel, before the entire courtroom minus the jury, that he would keep the jury out and teach him the rudimentary rules of evidence, he sustained the Prosecutor's objection.

The Supreme Court has addressed the nature of Opening Statements and the issue of "evidence," as follows:

> ¶ 107. With regard to the prosecution's opening statement, this Court has held that "the purpose of an opening statement is to inform the jury what a party to the litigation expects the proof to show." *Slaughter v. State*, 815 So.2d 1122, 1131 (Miss.2002) (quoting *Crenshaw v. State*, 513 So.2d 898, 900 (Miss.1987)). 34 ¶ 108. Furthermore, statements made by counsel during voir dire or during opening argument do not constitute evidence. *See Henton v. State*, 752 So.2d 406, 409 (Miss.1999) (closing arguments are not evidence); *Crenshaw v. State*, 513 So.2d 898, 900 (opening statements are not evidence).

Goff v. State, 14 So. 3d 625, 652 (Miss. 2009)

The Trial Judge had recently been appointed as Circuit Judge, having been a prosecutor for a long time. Perhaps it is difficult to distinguish between the roles, but regardless, Mr. Richardson was denied the right to have his attorneys make an opening statement, to make it without the interruption of having the jury brought out and in the courtroom, and to do so without the clear hostility of the presiding judge. Neither the rulings, the approach, the demeanor, the tone, the attitude nor impartiality of the judge was contusive toward the Defendant's right to a fair trial.

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statement, but also refused to allow the Defense to tell the jury that the statement continued after the call was disconnected by the officer.

The standard of review regarding admission or exclusion of evidence is "abuse of discretion;" however, this was not about "evidence" introduction. Instead, this was about the right of the Defense to make an Opening Statement. An incomplete Opening Statement, interrupted and under the scornful scowl of the Trial Judge is NOT and Opening Statement – perhaps it is a flawed attempt of a piece of an Opening, but it is not and Opening Statement. The correct standard to be applied under these circumstances would more appropriately be under the issue of Judicial Bias, which is in the following section describing ISSUE III.

In Jones v. State, 342 So. 2d 735, 737 (Miss. 1977), the defendant complained about a similar situation, except that the prosecutor in his case, unlike the case at bar, did not attempt to introduce a portion of a statement made by the defendant at the time of the incident, whereas Mr. Richardson's 911 call as described by the Prosecutor; however, the Court did set fort the applicable rule, as follows:

> It is the general rule, almost unanimously followed, that where the state introduces evidence of statements made by the defendant immediately after a crime, defendant is entitled to bring out the whole of his statement. Collins v. State, 148 Miss. 250, 114 So. 480 (1927); Davis v. State, 230 Miss. 183, 92 So.2d 359 (1957).

Jones v. State, 342 So. 2d 735, 737 (Miss. 1977)

Likewise, in Swinney v. State, 829 So. 2d 1225, 1235-36 (Miss. 2002), the issues and applicable rules were unequivocally set fort in the following similar scenario in which the Circuit Court erred in admitting incriminating portions of the defendant/Swinney's statement to police, but excluded exculpatory statement, described as follows:

> ¶ 42. On a motion in limine by the State, the trial judge admitted Swinney's confession into evidence as an admission under M.R.E. 801(d)(2), but excluded portions of her three previous statements to police where she said "I didn't do it" as inadmissible hearsay. Specifically, the court prevented the defense from questioning the officers about the exculpatory statements on cross-examination.
>
> ¶ 43. Swinney argues that if inculpatory portions of the statements she gave to police while in custody are admitted, then the entire statements must be admitted, including her exculpatory statements. As authority, she cites the following:

> If a statement is admissible in evidence as an admission or declaration, it is admissible as an entirety, including the parts that are favorable, as well as those parts that are unfavorable, to the party offering it in evidence. In the event a statement admitted in evidence constitutes part of conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation
>
> ...
>
> The general principles discussed above apply in criminal as well as civil cases. It is an elementary rule of law that when admissions of one on trial for the commission of a criminal offense are allowed in evidence against him or her, all that he or she said in that connection must also be permitted to go the jury ... The fact that the declarations made by the accused were self-serving does not preclude their introduction in evidence as a part of the whole statement.

29A Am.Jur.2d Evidence § 759, at 122–23 (1994) (emphasis added). Swinney also cites McIntyre v. Harris, 41 Miss. 81 (1866), for the proposition that where a part of a conversation is introduced into evidence, opposing counsel has a right to draw out the rest of the conversation on cross-examination.

¶ 44. The fact that Swinney thrice denied killing Harville (not the Harville in the case at bar) brings into question the veracity of her admission. She should have been allowed to question the officers regarding her entire statement on cross-examination. The fact that the State only used selected portions of her statement in its case in chief also may indicate bias by *1236 the State's witnesses in not being forthcoming with exculpatory evidence.

¶ 45. Furthermore, as was argued by Swinney at trial, adopting a rule such as that applied by the circuit court may force the defendant to testify to her statement in order to place it, in its entirety, before the jury. This may operate to subvert the accused's right not to testify in her own defense.

¶ 46. Therefore, the circuit court erred when it admitted the portions of Swinney's statements that favored the State's theory of the case while not allowing Swinney to draw out on cross-examination those portions of the statements that favor her position.

Swinney v. State, 829 So. 2d 1225, 1235-36 (Miss. 2002)

Although the rule is abundantly clear, unfortunately for Swinney, the Court did not find that the error was sufficient to have prejudiced the outcome of her trial. Id. at 1236. The same can not be said for the case at bar, for his entire defense was built around the reasons for self-defense that Mr. Richardson described.

However, Swinney has failed to show that this error has prejudiced the outcome of her trial. As a result, this error is harmless. With regard to the legal standard regarding the

admissibility of statements, a trial judge's determination that a confession is admissible will not be disturbed unless manifestly incorrect or against the overwhelming weight of the evidence. *Applewhite v. State*, 753 So.2d 1039, 1041 (Miss.2000). In the case at bar, the complaint is the failure to admit the entire statement, as well as the fact that the statement was made. There can be no denying that the inability of Mr. Richardson to inform the jury was irreparable error, and thus a denial of his right to due process and a fair trial. Thus, for the reasons described in ISSUE II, Mr. Richardson's conviction of Murder should be set aside, and the case remanded for a fair trial with proper admission of evidence.

III. THE CONTINUOUS AND OVERWHELMING DISPLAY OF JUDICIAL BIAS, PROSECUTORIAL MISCONDUCT, BOTH SEPARATELY AND COMBINED (CUMULATIVE EFFECT), DENIED MR. RICHARDSON'S RIGHT TO A FAIR TRIAL; WITH

- **a. PROSECUTOR'S ATTEMPT TO CONCEAL GUNSHOT RESIDUE TEST RESULTS (GSR) AND JUDGE'S CHASTISING DEFENSE FOR PROSECUTOR'S ATTEMPTED DECEPTION;**
- **b. JUDGE'S REFUSAL TO GRANT CONTINUANCE WHEN MR. RICHARDSON'S HEARING AIDS FAILED, AND REQUIRING HIM TO WEAR RIDICULOUS HEADPHONE EQUIPMENT;**
- **c. JUDGE'S ASKING WITNESS TO REPEAT TESTIMONY CONCERNING BELIEF THAT MR. RICHARDSON HAD BEEN DRINKING ALCOHOL;**
- **d. BOTH PROSECUTOR AND JUDGE'S COMBINED MISCONDUCT AND BIAS CONCERNING :**
  1. **INV. BROWN'S TESTIMONY;**
  2. **INV. BRITT'S TESTIMONY;**
  3. **PROSECUTOR'S MISCONDUCT IN STATING EVIDENCE WHICH WAS NOT IN EVIDENCE AND FALSE DURING CLOSING ARGUMENTS**
  4. **THE JUDGE'S DENIAL OF THE OBJECTIONS TO AND MOTIONS FOR A MISTRIAL TO ALL THE MISCONDUCT AND BIAS.**

[The facts related to this Issue as argued are set forth on pages 16 to 54 of this Appellant's Brief and incorporated herein by reference]

This section involves the consideration of numerous legal standards, which shall be set forth separately. All things being equal, the most significant impact of the fairness of any judicial proceeding before a jury, is the impartiality of the Trial Judge. The individual jurors come from various backgrounds, usually unfamiliar with the trial process, and obviously, they will look to the judge for guidance. In **Thompson v. State**, 468 So. 2d 852, 853-54 (Miss. 1985), the trial judge questioned a witness, which prevented fair consideration of his testimony. The Court described that dilemma as follows:

> [t]he court initiated a series of questions without request from the ***854** state or the defendant which had the effect, in our opinion, of re-constituting the witness and thereby lending the court's approval to her testimony before the jury. While it is true there was no objection to the court's interrogation, we nevertheless address the point.
> In *Shore v. State*, 287 So.2d 766, 768, 769 (Miss.1974), we concluded:
> ... However, the comment by the trial judge could, and very likely did, have the effect of bolstering the witness's testimony in the eyes of the jury since the court's stamp of approval was upon it. We do not state that the comment alone would constitute reversible error, but we do point out that comment upon the evidence by a trial judge in the presence of the jury is hazardous to affirmance on appeal. See *Green v. State*, 97 Miss. 834, 53 So. 415 (1910), wherein this court stated:
> "It is a matter of common knowledge that jurors, as well as officers in attendance upon court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding; and jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party...."
> *See also, Stallworth v. State*, 310 So.2d 900 (Miss.1975).
> 45 The great danger, particularly in a criminal case, is that the weight and dignity of the court accompanies each question or comment, although not so intended by the judge, and are very likely to be interpreted by the jury as the court's approval of the witness and her testimony, thereby lending unity to it and thus diverting the jurors' attention from their responsibility of deciding the case from the evidence, untainted, as heard by them from the witness stand. In our opinion, this was reversible error.

Thompson v. State, 468 So. 2d 852, 853-54 (Miss. 1985)

Further, the standard for considering judicial bias is described by the Court in the following:

> 12. "The trial judge always must be circumspect and unbiased, at all times displaying neutrality and fairness in the trial, and consideration for the constitutional rights of the accused." *Fermo v. State*, 370 So.2d 930, 933 (Miss.1979). We presume that a judge, who is sworn to administer impartial justice, is unbiased. *Turner v. State*, 573 So.2d 657, 678 (Miss.1990). The presumption that a judge is unbiased may be overcome by evidence showing beyond a reasonable doubt that the judge was biased. *Id.*
>
> Nicholson v. State, 761 So. 2d 924, 928 (Miss. Ct. App. 2000)

--prosecutor bias

Regardless of whether the Trial Judge asked a witness to repeat a question to emphasize the detrimental testimony, or requires a defendant to wear ridiculous headgear, such action send

a message to the jury that the Judge is against the Defendant, and thus, an abuse of discretion. The above is the standard and the considerations for the Trial Judge, but the Prosecutor's actions are equally significant. When prosecutorial misconduct happens, however it happens, this Court will reverse. In **Flowers v. State**, 773 So. 2d 309, 327 (Miss. 2000), the Court listed numerous instances in which the prosecutors committed error, and set forth as follows:

> *See, e.g., Wilkins v. State,* 603 So.2d 309, 317–22 (Miss.1992)(reversing murder conviction due to prosecution's tactics of introducing inadmissible evidence); *Griffin v. State,* 557 So.2d 542, 552–54 (Miss.1990) (reversing capital murder conviction due to cumulative effect of improper prosecutorial acts which denied defendant fundamentally fair capital murder trial); *Hosford,* 525 So.2d at 791–94 (reversing conviction due to prosecutorial misconduct in improper cross-examination including matters unsupported by evidence resulting in a denial of fair trial); *Williamson v. State,* 512 So.2d 868, 872–75 (Miss.1987) (reversing capital murder conviction due to prosecution's improper admission of evidence); *Foster v. State,* 508 So.2d 1111, 1114–15 (Miss.1987) (reversing capital murder conviction and stating that counsel must have a "good faith basis for any question asked on cross-examination"); *Hickson v. State,* 472 So.2d 379, 384–85 (Miss.1985) (reversing murder conviction due to prosecutorial misconduct resulting in denial of right to fair trial, citing cases prohibiting prosecutor from insinuation of matters unsupported by evidence); *Fuselier v. State,* 468 So.2d 45, 49–50 (Miss.1985) (reversing capital murder conviction due to improper actions of prosecutor denying defendant his right to a fair trial); *Smith v. State,* 457 So.2d 327, 333–35 (Miss.1984) (reversing conviction due to prosecutorial misconduct in manner of questioning witnesses and resulting denial of a fair trial, citing numerous cases); *Collins v. State,* 408 So.2d 1376, 1380–81 (Miss.1982)(reversing conviction due to cumulative effect of prosecutorial misconduct, including improper statements regarding evidence not in record, which denied defendant right to fair trial); *Clemons v. State,* 320 So.2d 368, 371–73 (Miss.1975)(reversing conviction due to prosecutorial misconduct in arguing facts not in evidence denying defendant of his right to a fair trial); *Sumrall v. State,* 272 So.2d 917, 919 (Miss.1973)(reversing conviction since defendant denied right to a fair trial due to cumulative effect of prosecutor's actions).

Flowers v. State, 773 So. 2d 309, 327 (Miss. 2000)

The FACTS section of this Brief, sets forth actions of the Prosecutor, in all respects and in all aspects of this case, that constitute error. All cases will be decided upon their on merits, but in this case, the misconduct is extensive, from the beginning through Closing Argument, in which the Prosecutor committed three separate prejudicial errs, each receiving an objection and

motion for a mistrial. The Court has discussed the Prosecutors duties in Closing Argument as follows:

> 28. Generally, attorneys on both sides in a criminal prosecution are given broad latitude during closing arguments. *Ballenger v. Mississippi*, 667 So.2d 1242, 1269 (Miss.1995); *Neal v. State*, 451 So.2d 743, 762 (Miss.1984). Prosecutors are afforded the right to argue anything in the State's closing argument that was presented as evidence. *Blue v. State*, 674 So.2d 1184, 1214 (Miss.1996); *Hanner v. State*, 465 So.2d 306, 311 (Miss.1985) *citing, Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). However, arguing statements of fact that are not in evidence or necessarily inferable from it and that are prejudicial to the defendant is error. *Tubb v. State*, 217 Miss. 741, 64 So.2d 911 (1953). Thus, prosecuting attorneys should refrain from doing or saying anything that would tend to cause the jury to disfavor the defendant due to matters other than evidence relative to the crime. *Sumrall v. State*, 257 So.2d 853, 854 (Miss.1972).

Banks v. State, 725 So. 2d 711, 718 (Miss. 1997)

And further, the Court as stated:

> In the closing argument a prosecutor is allowed to argue evidence that has been admitted. *Brooks v. State*, 763 So.2d 859, 864 (Miss.2000). However, "arguing statements of fact that are not in evidence or necessarily inferable from it which are prejudicial to the defendant is error." *Id. Dancer v. State*, 721 So.2d 583 (Miss.1998); *Banks v. State*, 725 So.2d 711 (Miss.1997). This Court does not condone the prosecution stating matters not in evidence and potentially causing the jury to disfavor the defendant. *Brooks*, 763 So.2d at 864; *Banks*, 725 So.2d at 711.
> ¶ 58. "The test for determining if improper argument by the prosecutor to the jury requires reversal is whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created." *Brooks*, 763 So.2d at 864 (quoting *Davis v. State*, 660 So.2d 1228, 1248 (Miss.1995)).

Slaughter v. State, 815 So. 2d 1122, 1133 (Miss. 2002)

The final paragraph of the above quote describes the standard, and it is respectfully submitted that the natural and probable effect of the improper argument of the Prosecutor created an unjust prejudice against Mr. Richardson that changed the verdict and caused an unjust conviction. The errors discussed above received objections, however, even where an objection is not made, and if the error is sufficiently egregious, then there is a doctrine that can come into play, and is described as follows:

> [W]e address the issue under the plain-error-doctrine which allows for our analysis of plain errors that were not properly raised by the defendant. M.R.E. 103(d). This Court may review plain error which "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (citations omitted). "Plain-error review is properly utilized for correcting obvious instances of injustice or misapplied law." *Smith v. State*, 986 So.2d 290, 294 (¶ 10) (Miss.2008) (quoting *Newport v. Fact Concerts*, 453 U.S. 247, 256, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981)).

Sanders v. State, 77 So. 3d 497, 505 (Miss. Ct. App. 2011), reh'g denied (June 21, 2011), cert. granted, 69 So. 3d 767 (Miss. 2011) and aff'd but criticized, 77 So. 3d 484 (Miss. 2012)

All the above, describe the numerous errors throughout all aspects of the trial, which have been presented individually; however, there is yet one more doctrine recognized by this honorable Court which is known as the cumulative-error doctrine, which is a ground recognized by our appellate courts indicating that where individual errors are not reversible in themselves, they may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. As described above, it is possible that the errors do not rise, on their own merits, to the level of reversible error; however, it is respectfully submitted, that the errors, in combination with each other, and in consideration of the fundamental principles of due process, constitute reversible error. In Ross v. State, 954 So. 2d 968, 1018 (Miss. 2007), the Court described the doctrine as follows:

> Ross argues the cumulative effect of the various errors in the trial, even if harmless, requires reversal and remand. The cumulative error doctrine stems from the doctrine of harmless error, codified under Mississippi Rule of Civil Procedure 61. It holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. *Byrom v. State*, 863 So.2d 836, 847 (Miss.2003). As an extension of the harmless error doctrine, prejudicial rulings or events that do not even rise to the level of harmless error will not be aggregated to find reversible error. As when considering whether individual errors are harmless or prejudicial, relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. *See, e.g., Leonard v. State*, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (Nev.1998) (citing *Homick v. State*, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996)). That is, where there is not overwhelming evidence against a defendant, we are more inclined to view cumulative errors as prejudicial.

Ross v. State, 954 So. 2d 968, 1018 (Miss. 2007)

The above summation of the applicable law with respect to the matters raised in ISSUE III, describe a situation much less egregious that what happened to Mr. Richardson. It is respectfully submitted that Mr. Richardson did not receive a fair trial and his conviction of Murder should be overturned and his case remanded back for a fair trial.

IV. SHOULD THE TRIAL JUDGE HAVE ALLOWED POST TRAUMATIC STRESS DISORDER (PTSD) TO HAVE BEEN USED AS A DEFENSE BY MR. RICHARDSON

[The facts related to this Issue as argued are set forth on page 54 of this Appellant's Brief and incorporated herein by reference]

This issue was submitted for the record, and with the hope that the Court would instruct the Trial Judge to allow evidence of Mr. Richardson's PTSD in support of his defense, should the medical evidence support the defense. In other words, at the time of the trial, the Defense conceded that PTSD was not a viable consideration in the State of Mississippi, but it was expected that the law would eventually change. A newly decided case, **Evans v. State**, 109 So. 3d 1044, 1049 (Miss. 2013), reh'g denied (Apr. 11, 2013), appears to validate the argument of the Appellant in that the Court reversed a conviction because the trial judge refused to allow funds to hire an expert witness to testify regarding PTSD for an indigent child defendant. While Mr. Richardson is not indigent, the fact that the Court reversed that case for the failure to allow a PTSD imperfect self-defense claim, by logical deduction, the same should apply to the case at bar.

Thus, it is respectfully submitted that upon the retrial with instructions for a fair trial, the Court should direct the lower court to allow evidence of PTSD, imperfect self-defense for Mr. Richardson, should the medical evidence support the same.

CONCLUSION

In summation, Mr. Richardson has never attempted to claim that he was entitled to a perfect trial; instead, he only requested and continues to be denied, his right to a fair trial. Very little was fair in this case, and more importantly, his conviction of Murder was not based upon the evidence approved and recognized by the Mississippi Supreme Court, but instead, was based upon an abuse of discretion of the Trial Judge and Prosecutorial Misconduct combined to subvert

justice. The conviction of Murder against Mr. Richardson should be set aside and the case remanded back to the lower court for a fair trial.

Respectfully submitted on this the 20th day of May, 2013.

HARVILL P. RICHARDSON

BY: _____
MICHAEL W. CROSBY

CERTIFICATE OF SERVICE

I, Michael W. Crosby, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following:

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